BYU Law Review

Volume 1982 | Issue 4 Article 3

11-1-1982

The Ebb and Flow of Antitrust Enforcement: The Reagan and Carter Administrations

Sanford M. Litvack

The Ebb and Flow of Antitrust Enforcement: The Reagan and Carter Administrations

*Sanford M. Litvack**

As other former Assistant Attorneys General have learned, one is frequently asked two questions about being the head of the Antitrust Division: First, "How did you like the job?"; and second, "What do you think of the current policies?" Let me share with you my candid answers to both questions.

As for the job, I think every one of my predecessors, as well as my successor, would agree with me—it is one of the best jobs in the world. While I did not hold the position as long as some others, I was there long enough to experience the excitement, the challenge, and the camaraderie that became a very special part of my life. Heading the largest law enforcement division in the largest law firm in the world—the Department of Justice—was a very special opportunity and thrill. Not only was I presented with difficult, important decisions of both a legal and a policy nature, but, perhaps more importantly, I was able to work with as good a group of people as one could find anywhere. The people in the Division were dedicated, hard-working, and extremely able. It was not at all unusual for staff lawyers to work fifty or sixty hours a week, and do this without any meaningful financial rewards or incentives. I found that the combination of the people, the challenges, and the job were ideal in every way, and I will always treasure that time of my life.

So much for the easy question. Let me turn to the more difficult subject of my views on current antitrust enforcement policies. This is in truth a hard question because no matter what anyone says there is probably some element of individual pride that creeps into an appraisal of one's successors. Also, the job teaches one to temper criticism: it's a good job but it can be a tough one. I am thus inclined to tread slowly and cautiously in assessing policies and performances. Finally, as I was constantly

---

* Assistant Attorney General, Antitrust Division, 1980-1981. B.A., 1956, University of Connecticut and University of Iowa; LL.B., 1959, Georgetown University. Mr. Litvack is a partner at Donovan Leisure Newton & Irvine, New York City.

reminded when I looked at the pictures on the wall outside the Assistant Attorney General's office, only a limited number of people have held the position, and so we are a small fraternity with a common bond.

Nonetheless, policies and priorities do change. Since they only represent judgments, one can fairly disagree without any personal antagonism. Recognizing that I am expected to inject some controversy into these proceedings, and not wishing to disappoint, I'm sure you will not be surprised to learn that I do have a different perspective on antitrust policies than that of the current administration.

A fundamental ground for departure is one's view of the antitrust laws and the role of the Antitrust Division. I consider the Antitrust Division to be first and foremost a law enforcement agency; the basic mission and purpose of the Division is to enforce the laws enacted by Congress and to police the economy to make sure it is working as Congress intended. In this respect, the Antitrust Division differs from the Federal Trade Commission, which has been, both by congressional mandate and historical practice, more concerned with general economic studies, reports, analyses and data collection. Recognizing that the FTC's important contribution to antitrust enforcement has been primarily in the research and analysis context, it has always seemed to me that the Division is and should be the primary law enforcer.

A major concern about the current approach of the Antitrust Division is that it appears to be backing away from this law enforcement obligation. First, much more emphasis is now placed on economic theory, study, and research, while less emphasis is given to investigation, prosecution, and the nuts and bolts of effection litigation. I seriously question this approach. If the agency is to remain a credible law enforcement agency it must prosecute cases; speeches are not sufficient. Even in the one area where the administration proclaims a serious interest—horizontal price fixing—very few cases have been initiated. To date, other than the road building cases which began in 1979 and 1980, the current administration has brought only one criminal case and five civil cases.

Second, the Reagan administration has openly repudiated enforcement of various aspects of antitrust law, particularly in the vertical area. While swearing to prosecute horizontal price fixing cases, the Division currently contends that most other en-

forcement should either be scuttled, modified or at least tempered. This reversal of policy is truly dramatic because antitrust enforcement has been fairly consistent since at least the late 1950's without regard to whether the administration was Republican or Democratic. Perhaps such changes should not be surprising because this administration, probably more than any other in recent years, has read its electoral victory as a mandate for change. The election of 1980 has resulted in fundamental transformations in all areas of government. An assessment of the impact of these changes however, suggests that more caution might be appropriate. This is particularly true in the antitrust area, where sweeping, sudden shifts in policy can create serious problems for both legal advisors and for the supposed beneficiaries of the new policies.

This refusal to enforce certain antitrust restraints raises broader questions about the proper role of the Antitrust Division within the Executive Branch. Certainly, prosecutorial discretion is crucial to the administration of a law enforcement agency with a limited budget. However, I believe that a public refusal to enforce the law in areas where the present chief prosecutor feels that the law is misguided can only lead to disrespect for those laws and for the agency empowered to enforce them, particularly when that refusal is combined with a general record of few prosecutions. If the administration is unhappy with the current status of the law, a sounder approach would be to persuade the courts to re-interpret the law or, if that fails, to ask Congress to change the law. When the Antitrust Division unilaterally repeals laws enacted by Congress and interpreted and applied by the judiciary, it usurps powers far beyond those of the Executive Branch.

Focusing on specific changes, there are two important areas in which antitrust enforcement policy has really become a policy of non-enforcement: (1) mergers and (2) vertical restraints, including price fixing. The current administration's merger policy is perhaps the most visible and widely publicized area of proposed change. Although horizontal mergers will continue to be scrutinized, the Antitrust Division has made an effort to fashion a lenient atmosphere for vertical and conglomerate mergers and has promised to issue new liberalized merger Guidelines. The Reagan administration appears to believe that prior merger policy was economically misguided and inhibited merger activity. The administration's plan is to encourage vertical and conglom-

erate mergers, which are seen as beneficial or at least competitively neutral, by developing new Guidelines that will (1) restrict the types of cases which the Division will prosecute and (2) give economic guidance to the courts in evaluating such mergers. In addition, the Division will reinforce the new Guidelines through amicus participation in cases where it is concerned that the court might apply the old, disfavored criteria.

It is obviously too early to evaluate the effect of the new merger policies, but certain comments can be made. The move toward more lenient enforcement of restrictions on vertical and conglomerate mergers does not truly represent much of a change from past practice, since few suits were brought in those areas anyway. Those few that were filed have generally not been successful and, except for a brief period, the Division has been reluctant to challenge such arrangements. That reluctance is, of course, well-known to antitrust lawyers and businessmen.

Mere pronouncements by the Antitrust Division do not change either the case law or the attitudes of the courts. Indeed, one impact of the new Division policy has already become obvious; in unfriendly takeovers the target is not going to wait for government assistance, but will act first. Looking at recent history, it seems that the government agencies are really becoming battlegrounds for negotiations over whether to sue or how to settle. In contested takeovers, each side becomes a participant in the government's negotiations, so that at an early stage the negotiations take on a public quality that cannot be helpful. Meanwhile, the courts, which must ultimately judge the lawfulness of mergers, seem ready and willing to apply the criteria embodied in the old Supreme Court cases and the existing Guidelines, even if not obligated to do so.

A final comment on the current merger policies relates to the issuance of new Guidelines. The existing Guidelines have acquired acceptance over more than a decade because they (1) generally reflected existing law when promulgated; (2) were usually applied consistently; and (3) most importantly, were readily understandable and provided real guidance to the business community and the antitrust bar. While personally I do not believe it is wise to rewrite the Guidelines in toto, there may well be merit to such an effort. But it is vital that the new Guidelines retain the characteristics which made the existing Guidelines so successful. They should be issued promptly, incorporate existing case law, and avoid confusion and undue complication.

It is important that the new Guidelines be issued promptly because the administration's well publicized abandonment of the existing rules has created a great deal of uncertainty about the current status of antitrust enforcement. We know what will not be attacked, but we do not really know what will be challenged. The new Guidelines can remove the uncertainty.

In a similar vein, if the Guidelines do not stay within the general parameters of existing case law, they will lack credibility. The courts remain available and responsive to private attacks on mergers. Hence, if the Guidelines move too far in front of the law, businessmen will be unable to rely upon them for fear that a merger would be blocked by existing law even if consistent with the Guidelines. While this risk may not be relevant in a friendly merger, it will be in many other situations.

Finally, the legality of a merger under the new Guidelines must be reasonably ascertainable. The Guidelines have traditionally served as a practical measure of the antitrust risks of mergers, not as an outline for in-depth economic studies of an industry. The existing Guidelines are not the perfect method of merger analysis but they do aid in the initial evaluation of the litigation risks of particular actions. Preliminary indications suggest that the new Guidelines will introduce a host of new and nonspecific factors to determine whether the government will challenge an acquisition. Many of these factors—such as the rate of technological change in an industry—are not easily quantifiable or determinable, and are not particularly helpful to those who must rely on them. If the new Guidelines are to gain acceptance and endure, they must satisfy the practical needs of the lawyers and businessmen who must give advice and make decisions within limited time periods, and with a degree of confidence in the antitrust implications of their actions.

Turning now to the area of vertical restraints, the Division appears to be actively looking for cases, even at the district court level, in which it can intervene on behalf of some poor, deserving corporate defendant. In other words, mere nonenforcement of the law, in this area, is not enough. Here the Division would like to tip the balance in favor of the corporation charged with tying or minimum resale price fixing by chiming in on the defendant's behalf at an early stage of the case. The practical problems are enormous, as I suspect the Division is learning. Government participation at the trial level in a nongovernmental case creates a number of problems concerning the govern-

ment's involvement in the development of the factual record. The government may find the record as developed by the private parties inadequate for its needs. However, if the government tries to develop a record, it is likely only to add to the morass of procedural and discovery problems that exist in most antitrust cases. This is not a mere nuisance; it is a serious matter which can complicate the case, add to the burdens of the court, and stand the world on its head by actually increasing the plaintiff's costs—costs which the plaintiff may not be able to recoup.

Beyond the practical problems, there is a more significant defect with this policy. The present Antitrust Division may be basing its decisions on an invalid presumption. Today it is fashionable in some quarters to jump on the "resale price maintenance is good" bandwagon; however, I continue to believe that fixing the price at which an independent seller can resell a product is an unwarranted intrusion on the free enterprise system. Because others who are certainly totally committed to the same basic concept of unfettered competition disagree with me on this subject, I have tried to determine the source of the difference in conclusions. The point of departure appears to be the belief of those who would allow resale price fixing that suppliers will always act rationally to maximize profits. From this starting point, they theorize that a supplier will, in his own interest and without prodding from the retailers, seek to maintain minimum resale prices for the sole purpose of excluding the discounters who trade on the promotion and services of others. As the argument goes, discounters, or "free riders," lead retailers to neglect promotion and service of the product, to the detriment of the supplier. Thus, the supplier will want to set and enforce resale prices to encourage product promotion and service, remove free riders, and stimulate inter-brand competition. The final point made by supporters of retail price fixing is that inter-brand competition will act as a natural brake on the prices which can be charged. Those now in the Division appear to have accepted these conclusions and the inherent presumption that resale price maintenance is the independent choice of the supplier, acting to maximize his own profits.

There is nothing particularly egregious about this theory, except that it has little basis in reality. Experience has taught that businessmen do not always act the way economists predict they should. Certainly, they do not always act for the motives—whether good or bad—attributed to them. In the real

world, promotion and service considerations are frequently illusory. While promotion may be relevant to some specialized products, in most cases it is not a very important factor in the resale price maintenance equation. Promotions are usually examined apart from price considerations. Retailers, particularly large ones, receive separate money for promotions, and in most cases retailers conduct promotions only when paid for in whole or significant part by the supplier. Thus, the idea that free riders will detract from promotions is a notion that has limited factual support. Further, it is difficult to determine how discounters ride free on service since (1) consumers who purchase from discounters realize they are giving up services for a lower price, and (2) on most products, service is provided by the supplier under warranty or similar program.

In truth, a supplier generally cares about resale prices for only two reasons: to enhance the product's image and to ensure a sufficient profit margin to the retailer as an incentive to carry the product. The retailers almost invariably bring these truths to the attention of the supplier, perhaps indirectly or subtly, but clearly nonetheless. Indeed, most retailers will tell you that if they did not prod their suppliers regarding resale prices, the suppliers would turn the other way and ignore discount sellers. After all, if no one complains it usually means more sales for the supplier. The supplier also knows that if there is a complaint he can, at least for a while, simply deny that he sold the goods to the discounters, deny that he knows anything about it, and deny that he condones the conduct. This will usually work once. Then retailer pressure will require that the problem be dealt with—by stopping the price competition. In short, a more realistic analysis suggests that resale price maintenance results from the retailers' desire to raise and maintain prices, and not the suppliers' interest in protecting product promotion and service. Prohibitions against such illegal price fixing should be enforced.

The important goal of intra-brand competition is protected by elimination of retail price fixing. Current policy at the Antitrust Division de-emphasizes intra-brand competition, suggesting that it must yield to protect inter-brand competition. This policy, however, assumes that competition in both areas cannot exist side by side, which is clearly not the case. We have managed in the past to have both intra- and inter-brand competition, and there is no reason to believe this cannot continue. We do not have to choose between these forms of competition be-

cause there is for most items both a full price, full service market, such as a fancy store, a fancy address or just a great deal of sales help, and a discount market, such as a self-service store. The consumer should be able to select either of these markets. The imposition of a system which precludes that choice by requiring minimum prices has been, and in my view should continue to be, illegal.

An enforcement policy which endorses these kinds of restraints is not just out of step with existing case law; it is also likely to lead to the disappearance of precisely the kind of competitor that our economic policies have valued for so long: the small businessman. Often enforcement of resale price maintenance eliminates the most vigorous, innovative and entrepreneurial competitors. I am well aware of the oft-repeated statement that the "antitrust laws are designed to protect competition not competitors," and agree with it in individual cases where the focus is and should be on the injury to competition generally, not merely a specific complainant. But if we are not mindful of a large group of important competitors, who will be left to compete?

In conclusion, the Antitrust Division and our antitrust laws are vital to protect our economic system. These laws represent a compromise between government control and total laissez-faire. I am convinced neither of these extremes will work. Vigorous enforcement of the antitrust laws has been and remains our best bet.