

ANTITRUST

A SPECIAL REPORT



High-tech sector sees uptick in scrutiny

Recent agency investigations offer insight into what targeted industries may expect.

BY R. DALE GRIMES, STEELE CLAYTON
AND MATT SINBACK

Candidate Barack Obama pledged to reinvigorate antitrust enforcement and “look carefully at key industries to ensure that the benefits of competition are fully realized by consumers.” President Obama and his antitrust team have been open about the growing number of industries in their sights—health care, telecommunications, banking, energy, transportation, agriculture and high technology. The playbook being run by the agencies in the high-tech sector provides insight on what may lie ahead for companies in these targeted industries.

High-tech has seen a definite uptick

in scrutiny from the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC). Recent investigations and challenges run the gamut of antitrust—Sherman Act § 1 prohibiting anti-competitive agreements, Sherman Act § 2 forbidding monopolization, § 7 of the Clayton Act covering mergers and even § 8 of the Clayton Act banning interlocking directorates. Four important lessons from the agencies’ foray into high-tech have emerged for other target sectors.

• *Lesson 1: Dominant firms will be scrutinized.* The Bush administration was criticized for lax antitrust regulation of dominant firms. Last fall, DOJ issued a report that established a relatively hands-off approach to § 2, a statute that pro-

hibits predatory conduct by dominant companies. Even then, three FTC commissioners, including now-Chairman Jon Leibowitz, criticized DOJ’s report for creating “a blueprint for radically weakened enforcement of Section 2.”

The Obama administration hit the reset



button. Soon after assuming leadership of the DOJ’s Antitrust Division, Assistant Attorney General Christine Varney pulled the report. She said “withdrawing the Section 2 report is a shift in philosophy and the clearest way to let everyone know that



the Antitrust Division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers.”

Enforcement activity in high-tech bears this out. The agencies are aggressively going after dominant firms for violations of § 2 and other antitrust laws.

GOOGLE BOOKS SETTLEMENT

For example, the agencies’ recent multiple investigations of Google Inc. exemplify why big players should expect continuous scrutiny. Google, along with other high-tech companies such as Apple Inc., Yahoo! Inc. and Genentech Inc. are under investigation for allegedly agreeing not to recruit each others’ employees. Such agreements, when not connected to an otherwise legitimate transaction, allegedly violate § 1’s prohibition on unreasonable restraints of trade.

Google’s proposed settlement of a copyright infringement suit brought by authors and publishers over Google Books has also drawn scrutiny. This summer, DOJ issued civil investigative demands to Google and some publishers, requiring information on pricing, strategy and communications among publishers regarding the settlement.



In September, DOJ submitted objections to the settlement, asserting that the settlement will permit authors and publishers to collectively set prices in violation of § 1. It also claims the settlement

would give Google an unfair advantage in digital distribution of books by granting it de facto exclusive distribution rights when the copyright owner is unknown or cannot be located.

Google is not the only high-tech company on the agencies’ radar. The FTC has been investigating Intel Corp., most likely looking at the kind of conduct that led the European Commission (E.C.) to fine Intel 1.1 billion euros in May 2009.

The E.C. concluded that Intel was dominant in the market for x86 central pro-



cessing units (CPUs) and had committed exclusionary abuses, including rebates for manufacturers that agreed to buy most of their CPUs from Intel and payments to manufacturers to delay launching products containing a competitor’s CPUs.

Currently, DOJ is investigating whether International Business Machines Corp. (IBM) abused its position in the mainframe computer market. In September, an industry group alleged that IBM was engaging in anti-competitive practices such as prohibiting customers from using its mainframe operating system on competitors’ hardware.

Other target sectors are already experiencing the agencies’ recharged focus on dominant firm conduct. The DOJ is reportedly reviewing whether telecom companies are abusing their market positions. Reports of the review surfaced at the same time that Senator Herb Kohl (D-Wis.), chairman of the Senate’s antitrust subcommittee and another important enforcement voice, demanded an investigation of competition in the cell-phone marketplace.

• *Lesson 2: Mergers are in the cross hairs.* Obama has promised to “step up review of merger activity and take effective action to stop or restructure those merg-

ers that are likely to harm consumer welfare.” Heightened merger enforcement will include two key facets.

First, more transactions will be subject to longer preclosing investigations. Parties to a significant transaction must notify the agencies before closing. The agencies generally have 30 days to decide whether further investigation is necessary.

If an investigation is opened, the parties must provide extensive information, with the investigation taking months to complete. If the transaction is challenged, litigation can take many more months or even years. Companies faced with these delays frequently abandon their deals.

COMPLETED TRANSACTIONS

Second, the agencies are likely to increase investigations and challenges of completed transactions regardless of whether advance notice to the agencies was required. Even a previously reviewed transaction can be re-examined after completion if the agencies believe it has harmed competition.

Both scenarios have been seen in the high-tech sector. In May, the FTC challenged CSL Ltd.’s acquisition of Talecris Biotherapeutics Holdings Corp., claiming the deal would reduce competition for plasma-derivative protein therapies. Shortly after the challenge, the parties dropped the deal.

DOJ recently requested additional information about a proposed 10-year partnership between Yahoo and Microsoft Corp. The partnership calls for Microsoft to act as the exclusive search technology provider for Yahoo and for Yahoo to be the exclusive sales force for the companies’ premium search advertisers. The deal would reduce the number of significant players in the search market from three to two.

In August, DOJ confirmed its investigation of the 2008 acquisition by Nuance

Communications Inc. of Philips Speech Recognition Systems. Nuance provides speech technology, including speech-to-text dictation, for the health care industry. Philips likewise provided speech-recognition technology for health care applications. The investigation may be focused on whether the transaction violates § 7 of the Clayton Act.

Other target sectors, particularly health care, have also seen increased merger

investigated whether Google and Apple unlawfully shared two directors, Google Chief Executive Officer Eric Schmidt and Genentech CEO Arthur Levinson. Without admitting a violation of § 8, Schmidt resigned from Apple's board in August 2009; Levinson resigned from Google's board two months later.

Section 5 of the FTC Act prohibits "unfair methods of competition." Two FTC commissioners have suggested that §



administration's crackdown on cartels in the high-tech industry. There are currently investigations and prosecutions ongoing for alleged price-fixing of dynamic random access memory (DRAM) computer chips, thin-film transistor-liquid crystal display panels and cathode-ray tubes. Expect no slack here.

In conclusion, be prepared. The agencies' activities in the high-tech sector portend what lies ahead for dominant companies in other targeted industries. A strong antitrust compliance culture and program are essential for companies in the targeted industries.

R. Dale Grimes and Steele Clayton are members, and Matt Sinback is an associate, at Nashville, Tenn.-based Bass, Berry & Sims. They practice in the firm's antitrust and trade practices group.

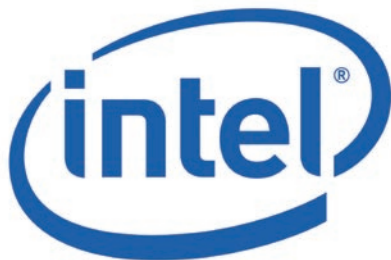


The FTC recently investigated whether Google and Apple unlawfully shared two directors; both later resigned.

enforcement. In July, the FTC challenged a 2008 acquisition of an imaging and surgery center by hospital system Carilion Clinic. Carilion subsequently agreed to divest the centers. Another example is the FTC's challenge of Thoratec Corp.'s proposed acquisition of a competing medical device manufacturer, which resulted in the parties' scrapping the deal.

• *Lesson 3: Don't forget the "other" antitrust laws.* While §§ 1 and 2 of the Sherman Act and § 7 of the Clayton Act are standard fare, the agencies have employed other antitrust laws.

For example, § 8 of the Clayton Act



prohibits an individual from simultaneously serving as a director or officer of competing companies. The FTC recently

5 should be used to address conduct that escapes condemnation under the other antitrust laws. As early as 2006, Leibowitz argued that § 5 "is a flexible and powerful Congressional mandate to protect competition from unreasonable restraints... that violate the antitrust laws, constitute incipient violations of those laws, or contravene those laws' fundamental policies."

Section 5 was advocated when the FTC issued a complaint and consent order against Negotiated Data Solutions LLC (N-Data). N-Data persuaded a standard-setting body to include its technology in the standard by promising to grant licenses at a bargain rate. Thereafter, N-Data sought higher fees. The FTC alleged that N-Data violated § 5 without alleging that the conduct violated any other antitrust law.

• *Lesson 4: Cartel enforcement remains a priority.* Cartels—conspiracies to commit core antitrust violations such as price-fixing—will be hunted and prosecuted. The Obama DOJ is continuing the Bush