Editor's Note
Seven Years On: Antitrust Enforcement During the Obama Administration

BY JAMES J. O'CONNELL

AN ADMINISTRATION STARTS TO wind down as an election year begins to heat up. A candidate for the Democratic party's presidential nomination, seeking to claim the progressive mantle in an era of economic uncertainty, issues a statement pledging to vigorously enforce the nation's antitrust laws if elected. Expressing concerns about the deleterious effects of increasing consolidation in many industries, the candidate promises to "take steps to stop corporate concentration in any industry where it's unfairly limiting competition." Such steps are to include "beefing up the antitrust enforcement arms of the Department of Justice and the Federal Trade Commission" and "hir[ing] aggressive regulators who will conduct in-depth industry research to better understand the link between market consolidation and stagnating incomes."

You might assume that these are Barack Obama quotes from 2007 or 2008. They are actually taken from a statement issued last October by Hillary Clinton's campaign,[1] but a certain sense of déjà vu is understandable. Clinton's pledge to enforce the antitrust laws to limit corporate concentration echoes aspects of the statement then-Senator Obama gave to the American Antitrust Institute in 2007, in which he was highly critical of the Bush administration's antitrust enforcement record.[2]

On first read, the Clinton statement might sound like a similar critique—at least, an implicit one—of the administration she is seeking to succeed. Read more closely and in full, however, the statement may be less about antitrust enforcement under the current administration and more about the candidate positioning herself against her Democratic primary opponent, Senator Bernie Sanders, as someone who will fight against big corporations on behalf of consumers. But even in that context, it is hardly—to quote former FTC Chair Bill Kovacic—"a robust endorsement of the enforcement status quo."[3]

There has always been a political element to antitrust policy, but Barack Obama's campaign criticisms of the DOJ and FTC enforcement records during the Bush administration and his promise "to reinvigorate antitrust enforcement" were striking. Ever since qualitative, value-laden concepts like "big is bad" gave way to quantitative economic analysis with consumer welfare as the guiding principle of antitrust enforcement, some of the political heat has gone out of antitrust, and policy swings between administrations of different parties have become less dramatic. Assessments of the records of administrations as they came to an end continued, of course, as did speculation about how enforcement might change with the advent of a new administration. But antitrust was not much of a political issue when Bill Clinton sought to replace George H.W. Bush, nor when George W. Bush sought to succeed Bill Clinton.

It seemed to be more of a political issue in 2008, however, and although antitrust was not nearly as prominent in that year's election as it was in the elections of a century ago,[4] the shift in rhetoric was striking. Indeed, 2009 was treated by some in the antitrust world as a kind of "Year Zero," with President Obama's first Assistant Attorney General for Antitrust expressing the view in an early speech that "inadequate antitrust oversight" under her predecessors had contributed to the 2008 financial crisis.[5] Now that we have reached "Year Seven," then, perhaps it is appropriate to look back and review some of the ways in which antitrust enforcement has actually changed since twelve noon on January 20, 2009, and also how it has not.

FTC Enforcement

Given its structure as a bipartisan commission, change tends to come more gradually and therefore less dramatically to the Federal Trade Commission than it sometimes does to its sister competition law enforcement agency, the Antitrust Division of the Department of Justice.[6] The differences between the end of one administration and the beginning of a new one are typically less stark, and when developments occur they are often incremental steps—albeit sometimes large ones—down paths that began several years earlier.

Section 5. For example, the FTC has brought several cases challenging conduct as "unfair methods of competition" under its "standalone" Section 5 FTC Act authority since the Executive Branch changed hands and it also published a brief statement of its enforcement principles in this area last August.[7] However, the current iteration of the idea of using Section 5 to go after conduct that does not violate the Sherman Act goes back at least as far as the final years of the previous administration,[8] although I doubt most Republican enforcement officials from that era would want to take much credit for it.[9] The idea has been developed further under the

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current administration, however, even if its roots may be rather older.

For example, near the end of 2009, under Chairman Jon Leibowitz, the FTC challenged Intel under Section 5 for, among other things, engaging in exclusive dealing to coerce computer manufacturers not to buy CPU chips from Intel's competitors and "secretly redesigning" its software "in a way that deliberately stunted the performance of competitors' CPU chips."[10] A complex case that merits (and has been given) more discussion than space permits here, the Intel case was notable for how much it resembled—in the theories of harm alleged as well as in the relief the FTC obtained—a European-style "abuse of dominance" case rather than a U.S. monopolization case.[11] Although not divorced entirely from traditional Section 2 analyses and concepts, it would likely have been a very different case had the FTC not had an enforcement tool at hand enabling it to target conduct determined simply to be "unfair." Those in the bar who were eager to see the FTC's theories tested in court—such as its allegations of liability based on the cumulative effects of Intel's "course of conduct," even if none (or few) of its specific actions could be found to violate Section 2—were to be disappointed, however, because the case was settled with a consent decree.[12]

The FTC brought its Section 5 authority to bear in the high-tech space again in early 2013 in the *Google/Motorola Mobility* matter. The FTC investigated allegations that Motorola Mobility, which had been acquired by Google, had breached commitments it had made to standard-setting bodies to license its "standard-essential" patents (SEPs) on terms that are fair, reasonable, and non-discriminatory (FRAND). There is considerable debate about what constitutes a breach of a FRAND commitment and whether such breaches in the context of SEP licensing violate the antitrust laws. That aside, a majority of commissioners voted out a complaint alleging that Google's and Motorola's conduct had been "unfair."[13] The investigation was settled with a consent decree that prohibits Google from seeking injunctions against "willing" licensees to block the use of any of its SEPs that are subject to FRAND commitments.[14]

Slightly more than a month earlier, in another SEP case, the Commission extended its Section 5 authority into the context of merger enforcement. In the *Bosch* case, the Commission obtained a consent decree that required Robert Bosch GmbH to divest assets related to the manufacture and sale of automobile air conditioning recycling, recovery, and recharge devices to preserve competition in the market for such devices that Bosch's acquisition of SPX Services would otherwise have eliminated.[15] In and of itself, this was unremarkable. What was more striking was the Commission's inclusion in that decree of requirements that Bosch not continue SPX's practice of pursuing actions for injunctive relief on the SPX SEPs it was acquiring and that it offer to license those patents on a royalty-free basis to implementers of the relevant standards.[16]

This aspect of the case represented two "firsts" for the FTC: it was the first time the FTC alleged that the seeking of injunctions against implementers of a standard by a holder of FRAND-encumbered SEPs constitutes an "unfair method of competition," and it was the first time the FTC used its Section 5 authority to justify the imposition of a non-merger specific conduct remedy in a merger case. The latter was particularly remarkable when one considers that, regardless of whatever anticompetitive effects may have occurred in the relevant technology markets after Bosch acquired SPX, those effects would not have been *because* Bosch acquired SPX. Bosch either would have continued that conduct, which might have invited a Section 5 enforcement action—one not subject to the timing pressures of a merger review and therefore one in which the FTC would have had less leverage over Bosch—or stopped it. Either way, the transaction would not have changed the relevant technology markets for the worse.

If Bosch means that the FTC may seek to expand its Section 5 enforcement through the merger review process—that, for example, it may require a buyer to scale back its exclusive dealing practices in markets that are unaffected by the acquisition because of concerns that those practices are "unfair methods of competition"—then the case will prove to have been a significant development.

Hatch-Waxman Settlements. The FTC's efforts to prevent branded pharmaceutical companies from settling patent infringement litigation on terms that the Commission argues reduce competition from generics also pre-dates this administration. The FTC got a boost in the summer of 2013, however, when the Supreme Court declared not only that such settlements can be anticompetitive, but that the then-prevailing standard for reviewing them, which focused on whether any effects on competition fell within the "scope of the patent," was too lenient.[17] The lower courts continue to wrestle with how to apply the *Actavis* decision,[18] but the FTC has noted that the use of such settlements has declined, not surprisingly, by nearly 50 percent since the year prior to the decision.[19]

Actavis was in many ways the culmination of an enforcement agenda that went back at least as far as the Clinton administration, during which the investigation that grew into the *Schering-Plough* case, which was filed in the early days of the Bush administration[20] and carried forward by a succession of Republican FTC Chairs, began. But the DOJ did not entirely see eye-to-eye with the FTC on the issue before 2009. While it agreed that settlements between branded and generic pharmaceutical companies can reduce competition, it did not believe that the standards favored by the FTC sufficiently balanced innovation incentives and the rights of patent holders to exclude competition for the term of the patent, on the one hand, and the desire to promote generic competition, on the other.[21] At her confirmation hearing, Christine Varney, President Obama's first AAG for Antitrust and a former FTC Commissioner, pledged to bring the DOJ into alignment with the FTC in this area.[22] That pledge was honored in the amicus brief the Antitrust Division filed later that year in the Second Circuit's *Cipro* case, in which it advocated treating reverse-payment settlements as "presumptively unlawful."[23] The FTC's win in *Actavis* almost certainly benefited from the support it received in the case from the Antitrust Division and the Office of the Solicitor General.

Mergers. When critics of the previous administration called for a reinvigoration of antitrust enforcement, they tended to have two areas in mind: mergers and unilateral conduct. With respect to both, from my perspective, the accusation that the previous administration's civil enforcement was "lax" is inaccurate, attempts to make qualitative assessments of enforcement based on quantitative analyses of the numbers of complaints filed, challenges litigated, or second requests issued are deeply flawed, and the conventional wisdom that the DOJ was so spooked by the *Oracle/PeopleSoft* loss that it thereafter avoided going to court is simply wrong. But, fairly or not, at the end of the Bush administration many believed that merger enforcement needed to be "reinvigorated."

Today, any client or counsel who doubts the agencies' willingness to take them to court simply hasn't been paying enough attention. The FTC has certainly been active. It has had to be: although the market collapse of 2008–2009 slowed merger activity significantly, in more recent years the FTC's Bureau of Competition, like the DOJ, has had to deal with a wave of ever-larger strategic mergers. The FTC's recent high-profile matters have also included: Nielsen/Arbitron; Hertz/Dollar Thrifty; Office Depot/OfficeMax, which the FTC chose not to challenge; Medtronic/Covidien; Western Digital/Hitachi; Kinder Morgan/El Paso Energy; Reynolds/Lorillard; and many pharmaceutical mergers in which the FTC obtained divestitures.

There have also been several significant hospital merger cases, including the FTC's challenges to the Phoebe Putney/Palmyra merger in Georgia, which resulted in an important Supreme Court decision regarding the state-action immunity doctrine (if ultimately not an unwinding of the deal), and to the St. Luke's/Saltzer Medical Group deal in Idaho which led to a potentially significant Ninth Circuit decision about efficiencies.

The FTC's merger litigation has not been limited to hospital deals. The parties to the Ardagh Group SA/Saint-Gobain Containers transaction settled with a consent decree as the administrative trial was approaching. The FTC also went to court over Sysco/US Foods, which it litigated and won; Steris/Synergy, which it litigated and lost; and, most recently, Staples/Office Depot redux, which is pending. An analysis of the extent to which any of these cases marked a change in the approach to merger enforcement deserves its own article. The theories of harm employed in two of the FTC's litigated challenges were a bit unusual, however, and therefore merit a mention.

The parties in *Steris* were two of the largest providers of contract medical sterilization services in the world. They did not compete in the U.S. market for radiation-based sterilization services, however. Although one of them, Synergy Health Plc, operates an X-ray sterilization plant in Switzerland, it had not built such a facility in the U.S., where only the other merging party, Steris Corp., and a non-party called Sterigenics compete to offer gamma radiation-based sterilization. The FTC challenged Steris's merger with Synergy, alleging that the latter had altered its plans to enter the U.S. market with a new facility because of its pending transaction with the former.[24] In other words, the FTC's theory was not that the transaction threatened to eliminate actual competition, but that it would eliminate the threat to the Steris/Sterigenics duopoly of "actual potential competition" from Synergy. Focusing on what would likely happen "but for" the merger is not unusual, of course. Nor is a potential competition theory, if the facts are there to support it. Combining the two into an argument that the merger caused one of the parties to abandon its plans to compete, however, was unusual, and although FTC officials have since said that they thought they had the facts and evidence on their side,[25] the FTC ultimately failed to convince the judge, who drew all other inferences in FTC's favor, that Synergy would enter the U.S. market absent the transaction.[26]

The FTC had better results three months earlier in the *Sysco* case, in which it alleged harm in a "national broadline foodservice distribution" market, three-quarters of which, it claimed, was held by the merging parties, Sysco Corp. and U.S. Foods Inc. The FTC argued that the transaction would enable the merged firm to exercise market power against large customers like hotel and restaurant chains, which may need to source products at a national level, even though they presumably have many alternatives at the local and regional levels.[27] The parties disputed the FTC's market definition and argued that they faced competition from local, regional, and specialty distribution companies in markets across the country and that even "national" customers use a variety of different suppliers in the markets in which they operate.[28]

The district court ultimately agreed with the FTC that there is enough that is different about national distribution and the requirements of certain national customers to justify defining a distinct relevant market around them.[29] The FTC's case was supported by unhelpful documents from the parties about the extent to which each sees the other as its primary competitor, as well as unhelpful documents and testimony from the company they put forward as the buyer of assets they proposed to divest to address the FTC's concerns. The FTC's request for a preliminary injunction was granted and the parties abandoned the deal a week later.[30]

Finally, no discussion of merger enforcement under this administration would be complete without mentioning the release in August 2010 of the agencies' revised Horizontal Merger Guidelines.[31] The 2010 Guidelines were in many ways a descriptive statement of how the agencies assess the likely competitive effects of mergers and other transactions. In that sense they were a continuation—albeit on a far more ambitious and comprehensive scale—of the Commentary on the Horizontal Merger Guidelines that the agencies released during the previous administration.[32] For years, they had been concerned that their 1992 Guidelines were being read, and applied by courts, as describing a linear, step-by-step analytical process that overemphasized market definition and did not adequately or accurately reflect how the agencies actually evaluate mergers. The revised Guidelines, among other things, were an effort to provide greater transparency into the agencies' analytical process, while also making it easier for them to challenge mergers by shifting the focus of that process, and the need for corresponding proof, away from market definition and towards quantitative assessments of likely competitive effects.

For the most part, the tools for predicting those effects that are described in the new Guidelines—econometric models that are used to calculate diversion ratios and predict likely price effects—are not new, although in some cases they were new to the Guidelines. But although the 2010 Guidelines provide greater transparency into what the agencies do when investigating mergers, they do not align with how courts tend to review them, nor with how the agencies themselves continue to litigate their merger challenges. The trend of course goes back well before the current administration, but merger reviews since 2010 are increasingly a data-driven search for competitive effects among ever-narrower groups of customers. While the agencies have not eschewed market definition, as they explain in the Guidelines the "analysis need not start with market definition" and "[s]ome of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition."[33]

While market definition may be set to one side during an investigation, the emphasis tends to shift when the time comes to write the complaint. The outmoded structural presumptions of cases like *Philadelphia National Bank* (*PNB*)[34] continue to be a staple, for example,[35] and while quantitative analysis is often also a critical part of a litigated merger challenge, courtroom arguments over market definition are far more of a focus than the 2010 Guidelines might suggest is the case during a merger investigation—with the FTC's recent market-driven win in Sysco/US Foods being a good example. With courts continuing to expect plaintiffs to define a relevant market[36] and the old *PNB* presumptions still forming part of a plaintiff's prima facie case, this may be understandable. From the government's or any other plaintiff's perspective, the sooner the burden of proof can be shifted to the defendant, the better.

But one wonders whether at some point the agencies, which are of course focused on succeeding at trial in individual cases, will also succeed in having the approach of their 2010 Guidelines become as widely adopted by the courts as the 1992 Guidelines were. If de-emphasizing market definition is the better way to go, the agencies should work to help the courts recognize that. If, on the other hand, they are concerned that their success rate will suffer if they try to get the courts to embrace the approach favored in the 2010 Guidelines, one might ask whether it is a good thing for the agencies to speak one language when deciding whether to challenge a merger but a different, older tongue when they go to court.[37]

DOJ Enforcement

As with the FTC, the DOJ's enforcement is constrained by judicial precedent and the limits of what can reasonably be obtained in a federal court. Indeed, the courts may exercise even more of a moderating influence on the DOJ than on the FTC, given that the former does not share the latter's role as an administrative agency. But because the DOJ's enforcement decisions and policy priorities are determined by a single presidential appointee rather than by a majority of five members of an independent commission, the DOJ's Antitrust Division can be more susceptible to change from one administration to another. This was apparent during the earliest days of the new administration.

Unilateral Conduct. One month after being sworn in as President Obama's first AAG for Antitrust, Christine Varney used the occasion of her first two major policy speeches to announce that she was withdrawing the preceding administration's Section 2 Report.[38] The fact that she did so, in and of itself, should have been neither surprising nor especially controversial. The report contained many statements of enforcement policy that the new administration and its AAG did not endorse, so the DOJ could hardly have been expected to leave them in place.[39] Notably, however, AAG Varney chose not to replace the Report with guidance regarding her own Section 2 enforcement views, her discussions of cases like *Lorain Journal*[40] and *Aspen Skiing*[41] in her speeches notwithstanding. Her successors at the DOJ and their fellow enforcers at the FTC have since been similarly silent.

Still, AAG Varney's decision and the rhetoric that accompanied it sent a clear message: there was a new sheriff in town.[42] But while it felt like a potentially significant change at the time, it seems less so here in 2016, largely because the new sheriffs have rounded up so few monopolists since then. The DOJ did file a monopolization complaint in early 2011 against United Regional Health Care Systems of Wichita Falls, which was simultaneously settled with a consent decree that required the hospital to discontinue its alleged practice of requiring commercial health insurers to enter into contracts that effectively prohibited them from contracting with its competitors.[43] But although the DOJ made a point of noting at the time that it was "the first case brought by the department since 1999 that challenges a monopolist with engaging in traditional anticompetitive unilateral conduct,"[44] the case was notable for no other discernible reason.

More recently, the DOJ filed a complaint in November against United Airlines and Delta Airlines, challenging United's effort to acquire 24 additional takeoff and landing slots at Newark Liberty International Airport.[45] Although the case seems to be primarily about blocking an anticompetitive transaction, the DOJ also included a Section 2 monopoly maintenance claim against United.[46] And, one could perhaps argue that the agencies' policy and advocacy work involving SEPs falls under the heading of monopolization enforcement, as it is driven by concerns over the conduct of patent holders who have achieved market power as a result of the adoption of standards that incorporate their technology, although the DOJ has brought no cases in that area.

The DOJ has been active in other areas of civil non-merger enforcement, where it has brought some very complex and significant cases. It successfully sued Apple and a group of book publishers for colluding to drive up the price of eBooks, for example, and it won its case against American Express (Visa and MasterCard having settled early) over that company's practice of restricting merchants from giving discounts to customers who use other, lower-fee credit cards.

But those efforts and accomplishments aside, looking back now at the monopolization *Sturm und Drang* during the 2008–2009 period, is it surprising that there have not been more—and more significant—Section 2 cases during the last seven years? That, seven years on from the withdrawal of the Section 2 Report, one can still ask the question one often heard before 2009: "Where is this administration's *Microsoft*?" It shouldn't be, for several reasons.

First, focusing on the number of cases filed under any given administration reveals little and overlooks much. The current administration opened many monopolization investigations but most of those did not result in a case being filed, while Google came far closer to being taken to court by a federal antitrust agency under the previous administration than it has so far under the current one.[47] Second, monopolization cases are rare, no matter the administration, because they are notoriously difficult to prove and the burdens that the government or any plaintiff must meet to win them are significant. The line between vigorous competition that benefits consumers and monopolization that harms them is usually very hard to discern, and close calls tend to go to the defendant. That, in a nutshell, may be why the FTC's investigation of Google's search business—arguably the highest-profile public monopolization investigation by the Obama administration (if one sets aside the FTC's *Intel* case, which, as noted, was not brought as a monopolization case)—died in the commissioners' offices. Such cases are not to be undertaken lightly, especially not by a federal agency whose resources are limited and whose other enforcement programs are so busy.

Third, although critics might like to see more big monopolization cases, there simply may not be that many out there. While vigilance against monopolistic conduct that harms competition and consumers is important, I have never shared the view of some that the American consumer is at the mercy of hordes of rapacious monopolists because the federal government doesn't bring enough Section 2 cases. That criticism of the prior administration implied there were many such enforcement actions to be brought, if only the leadership of the agencies would stop suppressing them. But the monopolization enforcement record of the current administration demonstrates that this was not in fact the case. And although it is possible that the administration's rhetoric discouraged companies that might otherwise have engaged in monopolistic conduct from pushing their luck—something that is impossible to test but, if true, could be chalked up as a kind of victory by the administration—that would not explain what happened to all of the monopolization cases that the last administration supposedly refused to bring.

Cartels. Cartel enforcement is likely the one aspect of the DOJ's mission that has changed the least under the current administration. This may be because few saw any need for change in 2008—although it is hard to say for sure, because critics of the Bush administration's enforcement record tended to ignore cartel enforcement altogether, or deal with it only cursorily before moving on to discuss civil enforcement. Perhaps this reflects the consensus and apolitical view that vigorous cartel enforcement is a good thing.

By all accounts, cartel enforcement remains a top priority of the agency, which has gone from success to success under the current administration. The staff continues to keep busy with investigations and cases in a diverse set of sectors, including auto parts, financial services (such as the LIBOR and other benchmark manipulation cases), real estate, and ocean shipping. The DOJ obtained a total of $3.8 billion in cartel fines during FY2015 alone,[48] a new record that was driven by the $2.5 billion it levied against five banks in May 2015, in its investigation into conspiracies to manipulate global foreign exchange markets. In the various auto parts cases, the DOJ has charged nearly 60 individuals and almost 40 separate companies, and secured more than $2.6 billion in fines, since bringing its first indictments in 2013.[49]

There have of course been some important changes in the structure and processes of the DOJ's cartel enforcement program since the previous administration, although it may be too early to assess their impact. For example, AAG Varney increased the extent to which the Antitrust Division's political appointees are involved in the management of the cartel program, to provide a greater degree of oversight. The DOJ also reorganized the Division's field offices, closing offices in Atlanta, Dallas, Cleveland, and Philadelphia and consolidating their operations (and much of their staff) into the New York, Chicago, San Francisco, and DC offices. Whether that will have an effect on the Division's local and regional caseload remains to be seen, although it does not seem to have slowed it down at the national and international levels.

Finally, the larger departmental decision to team the Antitrust Division with the Criminal Division for the complex investigations of alleged market manipulation involving financial benchmarks such as LIBOR as well as foreign currency exchange rates—cases that involve potential violations under both Title 15 and Title 18 of the U.S. Code—has resulted in the Antitrust Division modifying some of its usual practices, such as providing non-prosecution protections in plea agreements to all but the most culpable individuals. It is not known whether the Antitrust Division will begin teaming up with the Criminal Division on joint investigations outside of the benchmark manipulation arena or whether the Antitrust Division will modify its policies to bring them more into line with Criminal Division practice even in garden-variety Title 15 cases. Either would be a significant policy shift.

Mergers. On the merger enforcement front, the DOJ has been even busier than the FTC. This is perhaps to be expected, given the agency's determination to be seen as vigilant about mergers and the many opportunities with which it has been presented, as the wave of large strategic mergers has continued to build, to demonstrate that vigilance.

The DOJ's recent higher-profile merger matters have included: TicketMaster/LiveNation, Comcast/NBC Universal, Google/ITA Software, United Airlines/Continental Airlines, and General Electric/Alstom, all of which were settled with consent decrees; AT&T/DirecTV and Expedia/Orbitz, both of which the DOJ chose not to challenge; and Comcast/Time-Warner Cable, Applied Materials/Tokyo Electron, NASDAQ/NYSE Euronext, and Thai Union Group (d.b.a. "Chicken-of-the-Sea")/Bumble Bee Foods, all of which were abandoned in the face of DOJ opposition.

In addition, several of the DOJ's significant merger challenges were settled—or the transaction abandoned by the parties—at various points between the filing of the complaint and a final court decision, including: AB InBev/Grupo Modelo, which was settled pre-trial, a few months after the DOJ filed its complaint; AT&T/T-Mobile, which the parties abandoned in the face of FCC and DOJ opposition a couple of months before the scheduled trial got underway; American Airlines/US Airways, which was settled on the eve of trial; and, most recently, Electrolux/General Electric, which the parties chose to abandon after four weeks of trial.

As the Electrolux/GE deal demonstrates, a merger challenge that is litigated all the way to a verdict is still a rare thing. That said, the DOJ achieved notable victories in the two merger challenges that went all the way to a decision: the H&R Block/TaxACT and BazaarVoice/PowerReviews deals, the latter a rare litigated challenge to a consummated merger.

This record suggests a few things. First, anyone who labored under the impression that the DOJ was not willing to go to court to challenge a merger should by now have been disabused of that notion. Second, the DOJ's efforts to strengthen its litigation capabilities, even in the face of hiring freezes and budget sequestration, have paid off. That it has been able to plan for and conduct complex trials while simultaneously conducting other investigations, without either effort appearing to suffer because of the other, is notable, and no doubt the result of a lot of people working a lot of long hours. Third, and perhaps related to its litigation successes, by some accounts the DOJ has become tougher when it comes to remedies. It is more likely to require that the parties identify buyers for divested assets "up front," for example, and its 2011 statement on merger remedies arguably signaled, among other things, a greater willingness to seek behavioral remedies in merger cases.[50] It has also demonstrated that it is prepared to file a complaint if it is not satisfied that negotiations over remedies are heading in what it thinks is a productive direction.[51] That willingness to "litigate the fix" drove the DOJ's suit to block the VeriFone Systems/Hypercom transaction, for example,[52] and may arguably have been a factor in its decisions to file the complaints it did, when it did, in the AB InBev/Grupo Modelo and American Airlines/US Airways mergers.

But has merger enforcement changed substantively since January 20, 2009? Not from my perspective. If one focuses on the merger challenges that the current administration has chosen to bring and the theories of harm it has articulated in its complaints, for the most part I have not seen this administration take any great departures from the approaches of previous administrations. One can argue about the specifics of this enforcement decision or that consent decree, of course, and play the "what if" game. For example, what if the Bush DOJ, which concluded that the Whirlpool/Maytag merger was not likely to reduce competition substantially in the markets for residential washers and dryers, had also reviewed the Electrolux/GE transaction? Would it have concluded that the deal's likely effects on competition in the "contract-channel" market (homebuilders and other large-volume purchasers) for ranges, cooktops, and ovens justified a challenge, like the Obama DOJ did?

Or would the outcomes and consent decrees in Comcast/NBCU or Ticketmaster/LiveNation have been different had those deals been struck during the previous administration? The theory of harm in each case—the risk that the merged firm would be able to use the transaction to maintain its market power by stifling competition, from on-line content platforms and other sources in the case of Comcast or from a new provider of primary ticketing services in the case of Ticketmaster—was relatively straightforward. On the other hand, the consent decrees that the Obama DOJ negotiated included some complex behavioral remedies that may not have been as palatable under the previous administration.

Such questions cannot be answered with any degree of certainty, but generally speaking I think the transactions that the DOJ has chosen to block or modify in recent years would have encountered similar results prior to 2009—or, at the very least, would have been close enforcement calls. The AT&T/T-Mobile challenge seemed to catch some by surprise, for example, but it shouldn't have. Anyone who was involved in the DOJ's previous investigations of cellular telecommunications mergers could have told you that the time was coming when further mergers between national players would be challenged and that, when that time came, divesting spectrum to regional players in affected local markets would no longer be sufficient. Indeed, given the generous break-up terms that T-Mobile negotiated into its agreement with AT&T, the parties, at least, seem to have anticipated the outcome, even if they may have had differing views about their likelihood of success.

While I can't say for sure that the previous management would have signed off on every challenge that the current management has brought, based on what I have seen in the public record about those decisions the theories of harm that the evidence prompted the DOJ to pursue have for the most part seemed straightforward. One exception, perhaps, is the *American Airlines/US Airways* challenge—not the DOJ's decision to block it, which was not itself surprising or remarkable, but rather the theories of harm it articulated in its aggressive complaint, some of which had not been seen in previous challenges to airline mergers. But in the end, the DOJ chose to settle the case along more or less traditional lines, with the divestiture of take-off and landing slots at some of the more congested airports affected by the merger, in a decree that arguably left many of the concerns the DOJ had articulated in its complaint unaddressed.[53] One can perhaps read a greater willingness to engage in industrial planning into the remedy—or, at least, in the manner in which it was presented[54]—than one would have found in the previous administration, but I am nevertheless reluctant to read too much of a doctrinal shift into the case as it was resolved.

That does not mean that merger enforcement has not changed, however. For one thing, success breeds success in at least two ways: perception and confidence. During the last administration some held the view that the DOJ, having suffered a litigation defeat when it tried to block Oracle's acquisition of PeopleSoft, was reluctant to go to back court. Indeed, this view is still stated by some with great confidence, evidence to the contrary notwithstanding.[55] Regardless of their accuracy, however, perceptions matter, and the DOJ's recent merger wins—whether consent decrees, abandoned deals, or litigation victories—should have helped convince observers that it is very willing to bring civil enforcement actions. And the confidence gained by an agency staff that has seen more civil trials—and scored some big victories—also can't help but have an effect on how that staff conducts investigations, constructs case recommendations, and negotiates remedies. To the extent that this makes the Antitrust Division a stronger law enforcement agency, that's a significant accomplishment, provided that the agencies ensure that the desire to "win" doesn't result in investigations that are non-transparent or unnecessarily adversarial, and that the drive to be creative doesn't result in investigations that spend too much time and resources exploring theories of harm that aren't ever likely to pan out (or be accepted by a court).

Something else has clearly changed after January 20, 2009, and that is the rhetoric. To oversimplify grossly: Republicans talk like Elliot Ness when it comes to cartel enforcement but tend to be more circumspect when talking about civil enforcement. Democratic administrations, which talk tough about cartels, too, also tend to be more willing to apply the cartel enforcement tactic of *in terrorem* rhetoric to civil enforcement—even, on occasion, to signal their views about potential transactions where doing so furthers their enforcement objectives.[56] While rhetoric without enforcement success would have only gone so far, perhaps one of the reasons why this administration is seen as being tougher is because it has taken more opportunities to say that it is.[57]

Given all of that, some questions come to mind. What explains the ongoing wave of strategic mega-mergers, often announced by the merging parties with confident statements to the markets regarding the likelihood and timing of success before the antitrust agencies? Why have some deals apparently run off the rails because the parties and the agency were so far apart regarding remedies? Put simply, why do parties and their counsel keep presenting AAG Baer and Chairwoman Ramirez with opportunities to prove how tough they are?

The reasons for this apparent disconnect are a topic for another article. But as a concluding point, I will observe that none of this is especially unusual, because the appetite for risk is influenced by far more than antitrust. We in the antitrust bar—whether standing watch in government or advising clients in boardrooms—may sometimes be tempted to believe that merger enforcement moves markets, but most of the time it's the other way around. Market forces are far more likely to start a merger wave rolling—or to stop it—than antitrust rhetoric and enforcement, and they have more influence on which deals go forward and when, and in which industries, than perceptions of the toughness of enforcers. Antitrust is a factor, of course, and we are all familiar with transactions that did not get off the ground in part because of concerns about antitrust risk. But while antitrust enforcement can prevent consolidation in specific industries by blocking or modifying specific transactions, a view that who is in charge at the DOJ and the FTC makes a macro-level difference would be somewhat overblown.

Based on my own experience working on second request after second request in the late 1990s, for example, the Clinton administration certainly seemed to be vigilant about merger enforcement, yet the merger wave of that era was no less epic for that. And for seven years we have had an administration that has repeatedly shown its willingness to take parties to court, yet the big deals keep on coming because there is still a lot of money to be made from transactions that squeeze every last efficiency out of even already-concentrated industries. Bankers tempted by that prospect, and their clients in C-suites around the world, may not be as impressed by tough agency rhetoric as the agencies might expect. In-house counsel and their outside antitrust advisors of course include examples of recent deals that have suffered headline-grabbing Clayton Act deaths in the risk assessments they present to their clients. But those cautionary tales may actually have the effect of making litigated challenges more likely in deals that go forward in the face of that risk, to the extent that they inspire sellers to seek more generous break-up fees, litigation commitments, and similar provisions in their merger agreement.

Finally, despite the rhetoric of 2008 and the many modified, blocked, or abandoned deals since then, the fact remains that most mergers still are not challenged and most that are get through with consent decrees. Given that, and given that analysts may see some of the DOJ's recent high-profile complaints, such as *AB InBev/Modelo* and *American Airlines/US Airways*, simply as opening salvos in negotiations over remedies, clients can perhaps be forgiven for asking "If they got their deals through, why can't we?"

1 Hillary Clinton, *Being Pro-Business Doesn't Mean Hanging Consumers Out to Dry*, Quartz (Oct. 20, 2015), http://qz.com/529303/hillary-clinton-being-pro-business-doesnt-mean-hanging-consumers-out-to-dry/.

2 *See* Statement of Senator Barack Obama for the American Antitrust Institute (Sept. 27, 2007), http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf. Full disclosure: I served in several Antitrust Division front office positions as an appointee in the George W. Bush administration, including as Chief of Staff and as Deputy Assistant Attorney General for International, Policy, and Appellate matters.

3 William McConnell, *Rating the Presidential Candidates on Antitrust Positions—Former FTC Chairman*, TheStreet (Jan. 31, 2016) (quoting Kovacic's remarks at The Heritage Foundation conference "Obama Administration Antitrust Policy: A Report Card," http://www.thestreet.com/story/13437440/1/rating-the-presidential-candidates-on-antitrust-positions-former-ftc-chairman.html.

4 Compared with the high water mark of the 1912 presidential campaign, antitrust in 2008 wasn't even a sideshow. *See* William Kolasky, *The Election of 1912: A Pivotal Moment in Antitrust History*, Antitrust, Summer 2011, at 82.

5 Christine A. Varney, Ass't Att'y Gen'l, Antitrust Div., U.S. Dep't of Justice, Vigorous Antitrust Enforcement in this Challenging Era, Remarks as Prepared for the U.S. Chamber of Commerce (May 12, 2009) [hereinafter Varney Chamber Speech] ("This country's prior experience [during other economic crises] raises the question of whether current economic challenges reflect a 'failure of antitrust.' In other words, could United States antitrust authorities have done more? . . . It appears that a combination of factors, including ineffective government regulation, ill-considered deregulatory measures, and inadequate antitrust oversight contributed to the current conditions."), http://www.justice.gov/atr/speech/vigorous-antitrust-enforcement-challenging-era.

6 In the interest of space, I have chosen to focus on the agencies' competition law enforcement programs. The DOJ's appellate program, the FTC's consumer protection mission, and both agencies' extensive international efforts under the Obama administration, to mention just three examples, are subjects for other articles.

7 Fed. Trade Comm'n, *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf. *See also* James J. O'Connell, *August Surprise: The FTC's Section 5 Statement*, Antitrust, Fall 2015, at 5.

8 *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Challenges Patent Holders Refusal to Meet Commitment to License Patents Covering 'Ethernet' Standard Used in Virtually All Personal Computers in U.S. (Jan. 23, 2008) (regarding the *N-Data* case), https://www.ftc.gov/news-events/press-releases/2008/01/ftc-challenges-patent-holders-refusal-meet-commitment-license.

9 *See* Dissenting Statement of Chairman Majoras, Negotiated Data Solutions LLC (Jan. 23, 2008), https://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122majoras.pdf. Commissioner William E. Kovacic, who also dissented from the majority's decision to bring a Section 5 case against N-Data, succeeded Debbie Majoras as Chair. *See also* Timothy J. Muris, *Tim Muris on Josh Wright*, Truth on the Market (Aug. 25, 2015) ("Having witnessed firsthand the FTC's overreaching in the 1970s, . . . I have long thought that section 5 should be read coextensive with the Sherman and Clayton Acts. There is no need, especially with the maturity of the Antitrust Laws represented by the many 21st-century Supreme Court decisions, for separate, more expensive [sic] enforcement under section 5.), http://truthonthemarket.com/tag/tim-muris/.

10 Press Release, Fed. Trade Comm'n, FTC Challenges Intel's Dominance of Worldwide Microprocessor Markets (Dec. 16, 2009), https://www.ftc.gov/news-events/press-releases/2009/12/ftc-challenges-intels-dominance-worldwide-microprocessor-markets.

11 *See, e.g.*, Joshua Wright, *The Case Against the Section 5 Case Against Intel*, Truth on the Market (Jan. 7, 2010) (arguing that Commissioner Thomas Rosch's argument in favor of bringing Intel as a stand-alone Section 5 case was "an appeal to the European monopolization/abuse of dominant position approach that more readily equates harm to competitors with harm to competition"), http://truthonthemarket.com/2010/01/07/the-case-against-the-section-5-case-against-intel-cross-posted/. Wright would be sworn in as an FTC Commissioner three years later.

12 For a good overview of the case and the decree that resolved it, see John Graubert & Jesse Gurman, *The FTC/Intel Settlement: One Step Forward, One Step Back?*, Antitrust, Spring 2011, at 8.

13 *See* Statement of the Federal Trade Commission, Google Inc. (Jan. 3, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolastmtofcomm.pdf.; Press Release, Fed. Trade Comm'n, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (Jan. 3, 2013), https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc.

14 *See* Press Release, Fed. Trade Comm'n, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (Jan. 3, 2013), https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc.

15 *See* Decision & Order, Robert Bosch GmbH at 9–12 (Apr. 24, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/04/130424robertboschdo.pdf; Press Release, Fed. Trade Comm'n, FTC Order Restores Competition in U.S. Market for Equipment Used to Recharge Vehicle Air Conditioning Systems (Nov. 26, 2012), https://www.ftc.gov/news-events/press-releases/2012/11/ftc-order-restores-competition-us-market-equipment-used-recharge.

16 *See* Decision & Order, *supra* note 15, at 13–14.

17 FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013). *See also* James J. O'Connell, *The Elephant Remains*, Antitrust, Fall 2013, at 5.

18 *See* Lisa Jose Fales & Paul Feinstein, *Two Years and Counting Since* Actavis*: Developments in the Law*, Antitrust, Fall 2015, at 31.

19 Press Release, Fed. Trade Comm'n, FTC Report on Drug Patent Settlements Shows Potential Pay-for-Delay Deals Decreased Substantially in the First Year Since Supreme Court's *Actavis* Decision (Jan. 13, 2016), https://www.ftc.gov/news-events/press-releases/2016/01/ftc-report-drug-patent-settlements-shows-potential-pay-delay.

20 *See* Administrative Complaint, Schering-Plough Corp., FTC Docket No. 9297 (Mar. 30, 2001), https://www.ftc.gov/sites/default/files/documents/cases/2001/04/scheringpart3cmp_0.pdf.

21 *See, e.g.*, James J. O'Connell, *Second Bites and the Search for a Standard: The DOJ's* Cipro *Brief*, Antitrust, Spring 2010, at 7, 9.

22 *See id.* at 8.

23 *Id.* at 1.

24 *See* FTC Complaint for Temporary Restraining Order and Preliminary Injunction at 6–9, FTC v. Steris Corp., No. 15-cv-01080 (N.D. Ohio June 4, 2015), https://www.ftc.gov/system/files/documents/cases/150529sterissynergytro.pdf.

25 *See* Ron Knox, *Feinstein:* Steris *Shows Gap Between Agencies and Courts*, Global Competition Rev. (Feb. 5, 2016).

26 FTC v. Steris Corp., No. 15-cv-1080 (N.D. Ohio Sept. 24, 2015).

27 *See* FTC Complaint for Temporary Restraining Order and Preliminary Injunction at 3–9, FTC v. Sysco Corp., Civil Action No. 15-cv-00256 (D.D.C. Feb. 20, 2015), https://www.ftc.gov/system/files/documents/cases/150220syscousfcmplt.pdf.

28 *See* Melissa Lipman, *Sysco Lambasts FTC Case as $3.5B Merger Fight Starts*, Law360 (May 5, 2015); Michael Macagnone, *Sysco, US Foods Say Merger Won't Limit Customers' Options*, Law360 (May 12, 2015).

29 FTC v. Sysco Corp., 83 F. Supp. 3d 1 (D.D.C. 2015) ("Overwhelmingly, the evidence shows that players in the foodservice distribution industry—both its suppliers and customers—recognize broadline, systems, specialty, and cash-and-carry to be distinct modes of distribution.").

30 *See* Michael J. de la Merced, *Sysco Terminates Deal with US Foods*, N.Y. Times (June 29, 2015), http://www.nytimes.com/2015/06/30/business/dealbook/sysco-terminates-deal-with-us-foods.html?_r=0.

31 U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), http://www.justice.gov/atr/file/810276/download.

32 U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines (2006), http://www.justice.gov/atr/file/801216/download.

33 Horizontal Merger Guidelines, *supra* note 31, at 7.

34 United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963).

35 *See, e.g.*, U.S. Dep't of Justice, Plaintiff's Memorandum of Points and Authorities in Support of Its Motion for a Preliminary Injunction, United States v. H&R Block Holdings, Inc., Civ. Action No. 11-00948 (BAH), at 35 (D.D.C. Aug. 5, 2011) (citing the presumption in *Philadelphia National Bank* that "a merger giving one single firm 30% of the market and four firms 78% is "inherently likely to lessen competition substantially").

36 *See, e.g.*, United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 50 (D.D.C. 2011) (noting that "[d]efining the relevant market is critical in an antitrust case").

37 For a discussion of how this played out in the FTC's recent challenge to the consummated Polypore/Daramic (Microporous Products) transaction, see Douglas H. Ginsburg & Joshua Wright, Philadelphia National Bank*: Bad Economics, Bad Law, Good Riddance*, 80 Antitrust L.J. 377, 386–90 (2015).

38 *See* Varney Chamber Speech, *supra* note 5. AAG Varney actually announced her decision the preceding day, in a speech to the Center for American Progress. However, she delivered a nearly identical speech the following day, to the U.S. Chamber of Commerce. Only the second speech is available on the Antitrust Division's website.

39 AAG Varney did, however, decide to continue to make the Report available on the Division's website, so that the public could use it as a resource. *See id.* ("The Section 2 Report reflected a significant effort by my predecessors and the FTC in collecting and evaluating the opinions and expertise of antitrust enforcement officials from the United States and abroad, leading economists and legal scholars, antitrust practitioners, and representatives of the business community.").

40 Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

41 Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 472 U.S. 585 (1985).

42 *See, e.g.*, Varney Chamber Speech, *supra* note 5 ("The Antitrust Division must step forward and take a leading role in the development of the Government's multi-faceted response to the current market conditions. Vigorous antitrust enforcement action under Section 2 of the Sherman Act will be part of the Division's critical contribution to this response.").

43 Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with Texas Hospital Prohibiting Anticompetitive Contracts with Health Insurers (Feb. 25, 2011), http://www.justice.gov/opa/pr/justice-department-reaches-settlement-texas-hospital-prohibiting-anticompetitive-contracts.

44 *Id.*

45 *See* Press Release, U.S. Dep't of Justice, Justice Department Files Antitrust Lawsuit to Block United's Monopolization of Takeoff and Landing Slots at Newark Airport (Nov. 10, 2015), http://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-block-uniteds-monopolization-takeoff-and-landing.

46 *See* Verified Complaint ¶¶ 46–47, 49, United States v. United Continental Holdings, Inc., No. 2:33-av-00001 (D.N.J. filed Nov. 10, 2015), http://www.justice.gov/atr/case-document/file/792471/download.

47 *See* Press Release, U.S. Dep't of Justice, Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement (Nov. 5, 2008), http://www.justice.gov/archive/atr/public/press_releases/2008/239167.htm; Sam Gustin, *DOJ Ace: Google Dodged Monopoly Lawsuit By 3 Hours*, Wired (Dec. 4, 2008), http://www.wired.com/2008/12/doj-ace-google/. Press accounts suggest that the Division was poised to include a Section 2 claim in its complaint against Google. *See id.*; Nicholas Thompson & Fred Vogelstein, *The Plot to Kill Google*, Wired (Jan. 19, 2009). However, the press release issued by the DOJ after the parties abandoned their collaboration and made the filing of a complaint unnecessary does not refer to Section 2 or monopolization specifically.

48 *See* Melissa Lipman, *DOJ Scores Record $3.8B in Cartel Fines in 2015*, Law360 (Jan. 7, 2016).

49 *See* Press Release, U.S. Dep't of Justice, INOAC Corp. to Pay $2.35 Million for Fixing Prices on Auto Parts (Nov. 19, 2015), http://www.justice.gov/opa/pr/inoac-corp-pay-235-million-fixing-prices-auto-parts.

50 U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 12–17 (2011), http://www.justice.gov/atr/public/guidelines/272350.pdf.

51 *See, e.g.*, Ron Knox, *Gelfand: US Will Go to Court When Merger Proponents "Litigate the Fix,"* Global Competition Rev. (Feb. 8, 2016).

52 *See* Press Release, U.S. Dep't of Justice, Justice Department Files Antitrust Lawsuit to Stop VeriFone from Buying Hypercom and Entering into Anticompetitive Divestiture Agreement with Ingenico (May 12, 2011), http://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-stop-verifone-buying-hypercom-and-entering.

53 *See, e.g.*, David McLaughlin, *T-Mobile Lauded by Antitrust Chief amid Sprint Pursuit*, Bloomberg Bus. (Jan. 31, 2014) (noting that "[w]hen Baer sued . . . to block the merger of American Airlines and US Airways Group Inc., he said the government wanted a 'full-stop injunction' against the deal. [But a] settlement was reached . . . that required the carriers to give up takeoff and landing slots"), http://www.bloomberg.com/news/articles/2014-01-30/t-mobile-has-spearheaded-competition-antitrust-chief-says.

54 *See* Bill Baer, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at the Conference Call Regarding the Justice Department's Proposed Settlement with US Airways and American Airlines (Nov. 12, 2013) (claiming that the remedy "improves on a problematic status quo [by] provid[ing] more competition than exists today"), http://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-conference-call-regarding-justice.

55 As noted, Google and Yahoo! abandoned their search advertising deal in November 2008 under threat of an imminent DOJ complaint. Other transactions were abandoned or unwound after a complaint was filed by the previous administration, such as JBS SA's acquisition of National Beef Packing Co. and the consummated acquisition of the Daily Mail in Charleston, WV by the Daily Gazette Co. *See also* David L. Meyer, Dep. Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Merger Enforcement Is Alive and Well at the Department of Justice, Remarks at the ABA Antitrust Section Fall Forum (Nov. 15, 2007), http://www.justice.gov/atr/speech/merger-enforcement-alive-and-well-department-justice.

56 *See, e.g.*, Diane Bartz et al., *Sprint, T-Mobile Deal to Face Fierce U.S. Antitrust Headwinds*, Reuters (June 5, 2014) (quoting AAG Bill Baer's statement to the *New York Times*, echoing statements made at the time by FCC Chair Wheeler about a possible Sprint/T-Mobile merger, that "It's going to be hard for someone to make a persuasive case that reducing four firms to three is actually going to improve competition for the benefit of American consumers"), http://www.reuters.com/article/tmobile-sprint-corp-antitrust-idUSL1N0OM1R420140605.

57 The roadshow series of agriculture sector workshops that the Division held in conjunction with the Department of Agriculture during 2010, for example, were arguably as much about projecting vigilance as they were about developing policy.