The Scope of Antitrust Division Charging Authority Under a New Administration

BY MARY STRIMEL

On March 13, the Justice Department’s Antitrust Division announced that it had obtained a guilty plea from Israeli executive Yuval Marshak for defrauding a federal program that funds weapons purchases by U.S. allies. The division had indicted Marshak for seemingly every offense but the Sherman Act – wire fraud, fraud against the United States, and money laundering, among others.

This raises the question of whether the Trump administration will continue giving wide latitude to Antitrust Division prosecutors to charge a variety of crimes other than the Sherman Act. They have clearly possessed such latitude during the tenure of former Assistant Attorney General (AAG) Bill Baer and his deputy and successor, former Acting AAG Renata Hesse.

During the George W. Bush administration as well, the Antitrust Division brought a number of non-antitrust cases alleging the corruption of military procurements.

With reports that President Trump will name Division alum Makan Delrahim as his pick for the antitrust AAG, one might assume this breadth of focus will continue. Delrahim’s experience concentrates on the policy and merger side, with less focus on criminal cartel matters; thus, he might be tempted to defer to the views of his experienced criminal deputy, Brent Snyder. On the flip side, White House officials who say they are concerned about regulatory overreach may be looking for easy ways to cut back. Trimming the sails of career prosecutors could be one possibility.

Here are some issues that an incoming antitrust AAG may consider in setting the Antitrust Division’s running room.

Turf Wars to Come?

Any white collar offense that the Antitrust Division chooses not to investigate would theoretically fall either

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to the relevant U.S. Attorney’s office or to another component of the DOJ, such as the Fraud Section or the Public Integrity Section of the Criminal Division. Different prosecuting offices have different resources, specialties, and risk tolerances. Thus, the question of which office investigates a matter can sometimes determine whether charges will be brought at all. Incoming U.S. Attorneys, in particular, may also be zealous to protect their turf in corruption or fraud cases.

**Antitrust Division Prosecutors Will Assert a History of Success.**

Antitrust Division staffers who argue for more latitude can point to cases like the New Jersey Superfund subcontract corruption matter. That investigation involved corruption of bidding for subcontracts in return for payoffs. But in pursuing the conduct, prosecutors uncovered, and charged, the following: tax fraud, money laundering, and obstruction of justice. After obtaining several guilty pleas, they extradited one defendant from Canada and convicted him in a three-week trial. In all, the Antitrust Division netted three companies and 10 individuals, including a 14-year prison term for one person.

There are other types of cases that the division would argue it is well suited to bring. Prosecutions involving disadvantaged business programs appear to be among them. In this type of case, a bidder on a government contract uses a program designed for a woman-owned, minority-owned, or otherwise disadvantaged small business when, in reality, a large non-disadvantaged business does the bulk of the work and reaps the rewards. These cases do not fit the mold of a Sherman Act bid-rigging offense since the two companies are defrauding other horizontal bidders rather than colluding with them. These cases are also notoriously tricky to bring. They require intricate knowledge of federal bidding regulations and small business programs. And because the victimized contracts are usually a “success” – in that the work has gotten done – a prosecutor has to be willing to spend time on the investigation before it is obvious there is even a crime. From this vantage point, the Antitrust Division’s pursuit of Washington Gas Energy Systems and its settlement for $2.5 million for conspiring to defraud the United States looks impressive.

At the other end of the spectrum from small-business cases lies the government’s huge LIBOR prosecutions which, although they charged the Sherman Act against settling banks, relied on solely wire fraud counts for the indicted individuals. These cases, of course, were brought by the Criminal Division’s Fraud Section in addition to the Antitrust Division. However, had the Antitrust Division’s prosecutors been historically confined to Sherman Section 1, one may ask whether they would have been prepared to contribute significantly to the joint charging, investigation, and litigation in so massive a case. As it was, the prosecution team charged seven individuals in the joint investigation of LIBOR manipulation, obtaining four guilty pleas and convicting two individuals at trial. The Antitrust Division can thus point to a positive history of collaboration with other parts of the Justice Department.

**A New AAG Will Be Handed a Store of Credibility.**

This credibility is based on the perception that the Antitrust Division’s criminal program rarely blows with the political winds. The division’s staff and outside observers tend to believe that the division’s criminal policies do not map to a particular political party or belief system, and it is a point of pride that they are not influenced by politics. Thus, whichever way an antitrust AAG decides, he or she will want to focus on the Antitrust Division’s historic mission rather than politicized concepts of law and order or deregulation of markets.

The incoming Assistant Attorney General for Antitrust will have many priorities on his or her plate. Given the criminal program’s past history of prosecutions and its desire for future credibility, changing the division’s charging practices might not be among them.