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Acquisition Fevers

Merger-minded corporations are sick of the DOJ.

By Stuart Anderson

For decades, Soviet central planners decided which enterprises could exist and how they should operate. While the Soviet Union is a distant memory, the notion that a small group of people can figure out what is best for a nation's economy is alive and well in an unlikely place — the Antitrust Division of the U.S. Department of Justice (DOJ). This week's Senate Judiciary Committee confirmation hearing of Thomas O. Barnett to be assistant attorney general for antitrust offers an opportunity to reexamine this nation's antitrust policy.

A year can be a lifetime in the world of software and high technology. Yet based on the preferences of lawyers in the DOJ's antitrust division, companies may be forced to wait years before moving ahead with an acquisition. Every purchase or merger involving real money prompts a review by antitrust enforcers, whose power is immense.

Under the current procedures, companies must first submit documents explaining an acquisition and implicitly answering any possible objections from the DOJ. If the antitrust division is not satisfied in the "first round," it can ask for more information. To comply with this second, more expansive request is generally considered so time-consuming and disruptive that most companies withdraw an acquisition at this stage rather than endure the costly process, according to industry sources. The legal mechanism for blocking an acquisition is for the DOJ to sue in federal court. According to a forthcoming analysis by the American Shareholders Association, investors lost billions of dollars last year as stock prices of companies dropped as a result of DOJ antitrust review policies.

The policy question for Republicans is this: Why after so roundly criticizing the Clinton administration for its antitrust policies — including the case against Microsoft — has the Bush administration allowed career lawyers at the DOJ to promulgate essentially the same policies? In attempting to block Oracle's acquisition of PeopleSoft, SEC filings show that the DOJ ended up costing Oracle close to $100 million, not including the indirect costs of forcing the chairman, president, and other executives to spend weeks in depositions and, more generally, distracting them from their primary duties of running a major U.S. corporation.

The judge in the case disclosed that the DOJ paid one of its expert witnesses, an economist, over $1 million. No doubt it would have been front-page news if this economist had worked for Halliburton. Ultimately, in an embarrassing rebuke, the judge ruled squarely against the DOJ, but much of the damage had already been done.

In addition to the DOJ's antitrust division taking on the role of central planner, the time delays companies must endure in the acquisition process are now leading the U.S. to cede antitrust decisions to the European Union. In the past, the EU usually waited for an American court to rule before issuing a decision on an acquisition. Today, the EU's competition review body takes approximately five months to issue a decision, meaning that without timely U.S. government action it is the Europeans who get to decide the fate of U.S. corporate acquisitions. The EU's notions on antitrust are considered even more outdated than those of the DOJ's antitrust division, so ceding technology policy to Europe is bad for U.S. companies and the American economy.

The antitrust division of the DOJ continues to be guided by poor precedent. In 1911, the U.S. government separated Standard Oil into 33 entities — not because the company raised prices but because a judge decided it had concentrated various parts of the production process under one umbrella. Even before the case was settled, Standard Oil's market share fell from 90 percent to 60 percent.

The case of Alcoa Aluminum in 1945 was "equally absurd," notes economist Jim Cox. Alcoa was the dominant producer of primary aluminum in the United States. Yet similar to the Standard Oil case, there is no evidence that the company either restricted its output or raised prices. Yet here, too, the decision went against Alcoa.

These decisions reflect the mindset by which DOJ antitrust lawyers today evaluate acquisitions that cross their desks. Jim Cox points out that in the case of Alcoa, a judge had to restrict the definition of the market to "primary" aluminum, ignoring the competition represented by reprocessed aluminum. In the Standard Oil case, the judge did not address or take seriously imported oil as a competitive factor. "In other words, the courts had to first artificially narrow the market in order to find these companies guilty," says Cox. Narrowing the market and ignoring the potential entry of new competitors are common methods used by the DOJ to block acquisitions.

Some would argue that the real problem is that there are too many bureaucrats at the Department of Justice. Yet it's not clear that career lawyers are to blame. Career attorneys are not required, nor expected, to "make" policy unless allowed to do so by political appointees.

The real problem today is that since energy is likely focused on the war on terror and other areas, antitrust policy has been allowed to operate on auto-pilot, leaving in charge career attorneys eager to flex their muscles with limited concern for the negative impact on the fast-paced worlds of technology and industry. The solution is for leaders in the administration to adopt a market-friendly approach to antitrust policy, including faster reviews that encompass a genuine understanding of how markets operate. The conceit of central planning killed the Soviet Union. There's no reason we should allow it to continue harming American technology and innovation.

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