

Be willing to negotiate, former US antitrust chief tells companies

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News analysis

Christine Varney says groups should try to dispel DoJ concerns, says Helen Thomas

After two-and-a-half years heading the antitrust division of the US justice department, Christine Varney left for private practice only weeks before the DoJ's move to block AT&T's \$39bn purchase of T-Mobile USA.

Now, in her first week as a partner at New York's Cravath, Swaine & Moore, she has a message for prospective clients as they seek to deal with government antitrust lawyers – be willing to negotiate.

"The most common approach that I've seen parties take, that I don't think is fruitful, is to stonewall the government because you don't want to negotiate against yourself," Ms Varney said.

"The earlier you engage on the government's concerns, the more likely you are to be able to dispel them – and the more quickly you will get to resolution if they are credible."

With AT&T pledging to make its case in court, Ms Varney will not be drawn into discussing the deal.

While closely involved, she departed before the parties began moving towards last week's denouement.

But the DoJ's sudden decision to sue is among the most significant for antitrust enforcement under the Obama administration, which promised a more aggressive stance after the laissez faire years under President George W. Bush.

A speedier review was among her goals on joining the division in 2009, she argues.

"When you dedicate that amount of person-power and

analysis to a transaction, in most instances you do not need an 18-month process. We tried to make efficient decisions in all matters," she says, noting May's move to block Nasdaq OMX's attempts to buy NYSE Euronext.

Opinions vary about her time at the department. Some applaud her willingness to consider creative solutions, while other practitioners accuse her of overturning decades of well-established practice.

Either way, with the White House yet to nominate a successor and her deputy Sharis Pozen now at the helm, her approach is likely to persist there for the foreseeable future.

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Ms Varney, a former commissioner at the Federal Trade Commission, styles herself as pragmatic.

"I was interested in setting a course where the division was

willing to block any deal that met the criteria of substantially lessening competition while at the same time recognising that there can be solutions," she says. "It's not a binary decision, to block or to let the deal go."

That included a flurry of so-called conduct remedies, which govern companies' behaviour after a deal's close.

Comcast agreed to license programming as part of its tie-up with NBC Universal, while Ticketmaster committed to share software and open up ticketing at venues in buying Live Nation – both instances where companies were active in countering government concerns.

"We found enough credible evidence that this would be anti-competitive and I was prepared to block it," she notes of the former deal. "Comcast and NBC, to their credit, said: 'We understand your analysis and we are prepared to address the issues you've raised'. It could have gone the other way. They could have said, 'we disagree'."

Small deals also provoked unusual results. Having challenged the \$3m acquisition of a Virginia poultry processing plant by George's, the chicken company, the DoJ acquiesced, provided that the company

were willing to install a special freezer and deboning equipment.

"There is obviously a threshold for what is an appropriate use of government resources," says Ms Varney. "But the size of the deal does not drive the antitrust analysis. If a deal is anti-competitive, the government should approach it with the same amount of rigour."

At Cravath her diary is filling up, despite US ethics rules that bar her from representing

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clients before the DoJ for two years.

The firm already has a highly-rated antitrust group despite the fact that it has no Washington office, and Ms Varney's move up the east coast is a long-promised concession to her husband of 27 years.

"There are already a number of clients who are eager to get the benefit of her insight and experience," says presiding partner Evan Chesler. "She is going to be quite busy from the time she arrives."

So will the lawyers she leaves behind. However, Express Scripts' controversial \$29bn purchase of its rival Medco will be considered by the FTC.

Ms Varney bats away talk of friction between the bodies. Nor does she see a notable rise in companies in relatively-consolidated industries opting to take a punt on antitrust approval.

"It has always happened over the course of history," she muses. "Sometimes companies, as you would say of people, are not very self-aware."



Christine Varney: new role in private practice