

Concurrences

COMPETITION LAW REVIEW | REVUE DES DROITS DE LA CONCURRENCE

What is Trump Antitrust?

On Topic | Concurrences N° 4-2016

www.concurrences.com

Christopher J. Meyers

Associate General Counsel, Microsoft Corporation, Redmond Washington

John DeQ. Briggs

Co-chair and Managing Partner, Axinn Veltrop & Harkrider Antitrust Practice Group, Washington, DC

Donald C. Klawiter

Partner, Sheppard Mullin Richter & Hampton, Washington, DC

Alden F. Abbott

Deputy Director of the Edwin Meese III Center for Legal and Judicial Studies and the John, Barbara, and Victoria Rumpel Senior Legal Fellow, The Heritage Foundation, Washington, DC

Jim Tierney

Partner, Orrick, Herrington & Sutcliffe's Washington, DC

Albert A. Foer

Founder and Senior Fellow, American Antitrust Institute, Washington, DC

Michael L. Weiner

Partner, Dechert, New York

Logan M. Breed

Partner, Hogan Lovells, Washington, DC

Janet L. McDavid

Partner, Hogan Lovells, Washington, DC

Alvaro Ramos

Senior Legal Counsel, Head of Global Antitrust, Qualcomm, San Diego

Richard Taffet

Partner, Morgan Lewis & Bockius, New York

Aidan Synnott

Partner and Co-Chair of the Antitrust Practice Group, Paul, Weiss, Rifkind, Wharton & Garrison, New York

Sharis Pozen

Vice President, Global Competition and Antitrust, General Electric, Washington, DC

Mark Whitener

Global Executive Counsel, Competition Law and Policy, General Electric, Washington, DC

Joseph Farrell

Partner, Bates White, Washington, DC
Professor of Economics, University of California, Berkeley

John Kwoka

Neal F. Finnegan Distinguished Professor, Department of Economics, Northeastern University, Boston

Scott Sher

Partner, Wilson Sonsini Goodrich & Rosati, Washington, DC

Ben Labow

Of Counsel, Wilson Sonsini Goodrich & Rosati, San Francisco

Bradley Tennis

Associate, Wilson Sonsini Goodrich & Rosati, Washington, DC

James Langenfeld

Managing Director, Navigant Economics, Washington, DC
Adjunct Professor, Loyola University Law School, Chicago

William H. Rooney

Partner, Willkie Farr & Gallagher, New York

Agathe Richard

Associate, Willkie Farr & Gallagher, New York

Michael A. Carrier

Distinguished Professor, Rutgers Law School

Michael D. Hausfeld

Chairman, Hausfeld, Washington, DC

Michael P. Lehmann

Partner, Hausfeld, San Francisco

Bonny Sweeney

Partner, Hausfeld, San Francisco

What is Trump Antitrust?

3 A preliminary view

Christopher J. Meyers

Associate General Counsel, Microsoft Corporation, Redmond Washington

5 Fasten your seat belts: Here comes the Trump Administration

John DeQ. Briggs

Co-chair and Managing Partner, Axinn Veltrop & Harkrider Antitrust Practice Group, Washington, DC

11 Reflections on the next four years of antitrust enforcement

Donald C. Klawiter

Partner, Sheppard Mullin Richter & Hampton, Washington, DC

14 A strong competition policy prescription for a new U.S. Administration

Alden F. Abbott

Deputy Director of the Edwin Meese III Center for Legal and Judicial Studies and the John, Barbara, and Victoria Rumpel Senior Legal Fellow, The Heritage Foundation, Washington, DC

19 The tea leaves say: Back to the future for antitrust enforcement

Jim Tierney

Partner, Orrick, Herrington & Sutcliffe's Washington, DC

22 Toward a counter-reformation for antitrust

Albert A. Foer

Founder and Senior Fellow, American Antitrust Institute, Washington, DC

28 The Antitrust agenda of a billionaire populist President

Michael L. Weiner

Partner, Dechert, New York

30 Antitrust in a Trump Administration: A call for continuity

Logan M. Breed

Partner, Hogan Lovells, Washington, DC

Janet L. McDavid

Partner, Hogan Lovells, Washington, DC

33 Antitrust and the new Administration: An international perspective and the importance of due process

Alvaro Ramos

Senior Legal Counsel, Head of Global Antitrust, Qualcomm, San Diego

Richard Taffet

Partner, Morgan Lewis & Bockius, New York

37 Antitrust enforcement in the United States: A look ahead

Aidan Synnott

Partner and Co-Chair of the Antitrust Practice Group, Paul, Weiss, Rifkind, Wharton & Garrison, New York

40 The future of antitrust policy from an in-house perspective

Sharis Pozen

Vice President, Global Competition and Antitrust, General Electric, Washington, DC

Mark Whitener

Global Executive Counsel, Competition Law and Policy, General Electric, Washington, DC

43 Resetting merger policy in the new Administration

Joseph Farrell

Partner, Bates White, Washington, DC
Professor of Economics, University of California, Berkeley

John Kwoka

Neal F. Finnegan Distinguished Professor, Department of Economics, Northeastern University, Boston

48 Antitrust in the Trump Administration

Scott Sher

Partner, Wilson Sonsini Goodrich & Rosati, Washington, DC

Ben Labow

Of Counsel, Wilson Sonsini Goodrich & Rosati, San Francisco

Bradley Tennis

Associate, Wilson Sonsini Goodrich & Rosati, Washington, DC

51 The need to revise the U.S. non-horizontal merger guidelines

James Langenfeld

Managing Director, Navigant Economics, Washington, DC
Adjunct Professor, Loyola University Law School, Chicago

59 A holistic assessment of dynamic competition

William H. Rooney

Partner, Willkie Farr & Gallagher, New York

Agathe Richard

Associate, Willkie Farr & Gallagher, New York

63 Pharmaceutical antitrust: What the Trump Administration can do

Michael A. Carrier

Distinguished Professor, Rutgers Law School

66 Antitrust enforcement in the United States and Europe

Michael D. Hausfeld

Chairman, Hausfeld, Washington, DC

Michael P. Lehmann

Partner, Hausfeld, San Francisco

Bonny Sweeney

Partner, Hausfeld, San Francisco

Antitrust in the Trump Administration

Scott Sher

ssher@wsgr.com

Partner, Wilson Sonsini Goodrich & Rosati, Washington, DC

Bradley Tennis

btennis@wsgr.com

Associate, Wilson Sonsini Goodrich & Rosati, Washington, DC

Ben Labow

blabow@wsgr.com

Of Counsel, Wilson Sonsini Goodrich & Rosati, San Francisco

1. On January 20, 2017, Donald Trump will be sworn in as the next President of the United States. Many in the business community may wonder how a Trump Presidency will affect policy and practice at the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) (collectively “the agencies”). While it is impossible to predict how a change in administration will affect the DOJ’s and FTC’s treatment of specific cases, we expect there to be a decrease in enforcement activity at the agencies.

I. What positions has President-elect Trump taken on antitrust?

2. President-elect Trump’s stance on antitrust enforcement still is largely unknown at this point. While economic policies—most notably, free trade—served as a focal point for much of his campaign, he has remained relatively silent on competition policy. Nonetheless, his statements on antitrust enforcement specifically have tended to be pro-enforcement with respect to both mergers and conduct. For example, after AT&T announced its bid to acquire Time Warner, President-elect Trump stated: “AT&T is buying Time Warner and thus CNN, a deal we will not approve in my administration because it’s too much concentration of power in the hands of too few.”¹ Trump’s stated opposition to the proposed AT&T/Time Warner deal is notable because it

primarily is a vertical merger, and conservative antitrust practitioners typically view vertical mergers as efficiency enhancing and procompetitive.

3. President-elect Trump has also made statements that echo Senator Elizabeth Warren’s populist “big is bad” approach to monopoly cases. Most notably, Trump singled out Amazon, stating that Amazon CEO Jeff Bezos has “a huge antitrust problem because he’s controlling so much, Amazon is controlling so much of what they are doing.”² Senator Warren also took aim at Amazon during the campaign, highlighting complaints that Amazon abuses its dominant position in book sales.³ Trump’s campaign later elaborated that Amazon has “monopolistic tendencies that have led to the destruction of department stores and the retail industry.”⁴ Senator Warren made similar statements regarding Wal-Mart’s effect on small businesses.⁵

4. In sum, President-elect Trump has taken a populist approach to antitrust, at least while on the campaign trail. However, it remains to be seen whether Trump’s statements regarding AT&T/Time Warner and Amazon will translate into types of populist antitrust policies advocated by Senator Warren. The last truly populist Republican President was Theodore Roosevelt, who

¹ <https://www.washingtonpost.com/news/the-switch/wp/2016/11/11/trump-may-have-a-harder-time-blocking-the-massive-att-time-warner-merger-than-he-thought/>

² <http://www.recode.net/2016/11/9/13573926/donald-trump-amazon-jeff-bezos-antitrust-taxes>

³ Senator Warren stated: “groups representing thousands of authors claimed that Amazon uses its position as the dominant bookseller to steer consumers to books published by Amazon to the detriment of other publishers and that it extracts larger and larger shares of book profits from publishers, which discourages publishing houses from publishing riskier books or books written by lesser-known authors.” http://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf

⁴ <http://www.recode.net/2016/11/9/13573926/donald-trump-amazon-jeff-bezos-antitrust-taxes>

⁵ Senator Warren stated: “Wal-Mart’s gigantic size gives it a competitive advantage over small businesses. And often, when Wal-Mart moves into town, small businesses collapse because they can’t compete with the price leverage Wal-Mart has built with its suppliers.” http://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf

aggressively enforced the Sherman Act and made “trust-busting” a focal point of his presidency. Thus, while it is possible that President Trump will vigorously enforce the nation’s antitrust laws along the lines of what Senator Warren has proposed (e.g., with a focus on reducing concentration in the financial services, high technology, and media industries), that would not be the case if President-elect Trump appoints traditional conservative Republicans to top positions at the DOJ and FTC. In such a case, we believe his administration is more likely to follow the policy and practice of previous Republican administrations, such as the Bush Administration.

II. What does it mean for antitrust in the new Administration?

5. Republican administrations tend to be much more conservative overall with respect to antitrust enforcement, and we expect President-elect Trump to continue this trend despite his comments. Notably, President-elect Trump has tapped Joshua Wright—a law professor at George Mason University and a former FTC Commissioner—to lead the FTC transition efforts. The President-elect’s appointments to the FTC and DOJ will shape the agencies’ policies. Assuming they share the same views on antitrust as officials in past Republican administrations; we expect to see a decrease in enforcement activity at both agencies.

6. Enforcement activity during the Bush Administration serves as a useful point of comparison. As Acting Assistant Attorney General Renata Hesse noted in a recent speech, during the Obama Administration “a total of 40 mergers have been blocked by court order or wholly abandoned by the merging companies in the face of [a DOJ] investigation, a stark increase from 16 in the [Bush] Administration.”⁶ With respect to conduct cases, the Bush-led DOJ issued a report monopolization advocating for reduced enforcement activity under Section 2 of the Sherman Act. Christine Varney—President Obama’s first pick to run the Antitrust Division—withdrawed the report soon after Obama took office.⁷

7. Before discussing how a Trump Presidency may affect antitrust enforcement, there are at least three important considerations to keep in mind. *First*, although the President may set some high-level enforcement priorities for the FTC and DOJ, the White House rarely plays a significant role in the handling of individual cases. Even enforcement agenda priorities typically are left to the discretion of management at the DOJ and the FTC. Appointments to key positions at the DOJ

(Assistant Attorney General) and FTC (Chairperson and Commissioners) will largely be responsible for setting the agenda and deciding whether or not to pursue and litigate individual cases. *Second*, the vast majority of investigatory (CIDs or Second Requests) and litigation recommendations originate with career attorneys, who are largely immune to outside political influence. *Third*, there is broad bipartisan consensus amongst antitrust lawyers, economists, and the courts regarding the appropriate framework for analyzing most antitrust cases. The primary areas of divergence are certain categories of unilateral conduct cases (e.g., predatory pricing, bundling) and the treatment of vertical mergers. Thus, we do not expect significant changes to the framework used to examine Sherman Act Section 1 cases (criminal and civil) or horizontal mergers

1. Merger review

8. Merger enforcement has been a priority throughout the Obama Presidency, but we do not believe that trend will continue under a Trump Administration. While we expect the agencies will continue to conduct thorough investigations into mergers, we do not anticipate there will be as much of an appetite for merger challenges. The one exception may be strategic high-profile media deals (i.e., AT&T/Time Warner), or other unpopular consumer-facing deals that feed into President-elect Trump’s populist platform. However, attacking such deals would likely put Trump at odds with traditional free market Republicans, including the people he likely will appoint to run antitrust at the FTC and DOJ. Thus, unless the White House takes a direct interest in these deals, they likely receive a level of scrutiny typical of prior Republican administrations.

9. Many in the business community may wonder how a decline in antitrust enforcement under the Trump Administration will affect their business. Below are some tips for companies thinking about doing strategic deals during a Trump Presidency.

Don’t Assume A Free Pass: While the odds of securing clearance for your deal may increase, do not expect a rubber stamp from antitrust enforcers. First, investigations are largely driven by staff attorneys and economists, and therefore Second Requests will remain the norm for problematic deals. Second, though the FTC and DOJ are less likely to bring cases under a Trump Administration, we do not expect litigation to grind to a halt. The Bush Administration challenged a number of mergers that were not obviously anticompetitive, including Oracle/PeopleSoft (DOJ lost at trial), Whole Foods/Wild Oats (FTC lost at trial and won on appeal), and CCC/Mitchell (FTC won at trial on a coordinated effects theory, but the court was skeptical of the FTC’s unilateral effects theory).

⁶ <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-opening>

⁷ <https://www.justice.gov/opa/pr/justice-department-withdraws-report-antitrust-monopoly-law>

For Problematic Deals, Think About Remedies First: We expect the agencies will be more open to remedies to solve for competitive problems. Thus, giving early thought to potential divestiture packages for deals that raise obvious horizontal issues—such as AT&T/T-Mobile and Staples/Office Depot—could mean the difference between clearance and litigation. Additionally, remedy packages that may have been viewed as insufficient under the Obama Administration could be viewed differently under a Trump Administration. Even a relatively weak remedy package can enable the agencies to claim victory (and avoid appearing too soft on merger enforcement) without departing significantly from free market principles.

2. Conduct cases

10. President-elect Trump has not taken a public position on conduct cases,⁸ but we anticipate a decline in Section 2 and Section 5 investigations under his administration. Conduct cases represent one of the few areas of significant divergence in antitrust. Past Republican DOJ and FTC appointees have tended to believe that the conduct prohibited by Section 2 should be very limited in scope and that the FTC’s authority under Section 5 should be limited.

11. We anticipate that the agencies may issue new guidance regarding the types of conduct that are prohibited under Section 2 and Section 5. As discussed above, the Bush Administration DOJ issued a policy report on monopolization that was subsequently withdrawn by the Obama Administration DOJ. The DOJ under Trump may re-issue that report. Additionally, Professor Wright, while a Commissioner at the FTC, advocated for the FTC to adopt a clear policy statement regarding the FTC’s authority to bring unfair methods of competition cases under Section 5.⁹ The FTC subsequently did issue a “Statement of Enforcement Principles”¹⁰ regarding Section 5, but many—including Republican Commissioner Maureen Olhausen—criticized them as being watered down and too vague to be useful.¹¹ An FTC led by Trump appointees may revisit the Section 5 debate and seek to cabin in Section 5 along the lines originally suggested by Professor Wright.

III. Conclusion

12. President-elect Trump will have an opportunity to make appointments to the DOJ and FTC that reflect the free market positions Republican Party. An attitudinal shift in agency leadership could lead to a decrease in scrutiny of mergers and a decline in investigative activity, especially with respect to conduct cases. ■

⁸ Note, however, that Trump was once a plaintiff in a Section 2 case brought against the NFL. <http://www.businessinsider.com/donald-trump-sued-nfl-as-usfl-team-owner-2016-2>

⁹ https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-joshua-d.wright/130619umcpolicystatement.pdf

¹⁰ https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf

¹¹ <https://www.ftc.gov/public-statements/2015/08/dissenting-statement-commissioner-ohlhausen-ftc-act-section-5-policy>