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The new US antitrust administration

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The new US antitrust administration

This special set of articles focuses on antitrust law and enforcement in the aftermath of the American Presidential Elections. It questions the changes and challenges expected in 2021 under the new Biden administration, and its impacts with respect to antitrust legislation and competition policy in the USA.

Ce dossier se concentre sur l'antitrust et ses possibles développements à la suite des élections présidentielles américaines. Il s'interroge sur les changements et défis attendus pour 2021 sous la nouvelle administration Biden, et leurs impacts sur la législation et la politique de la concurrence aux États-Unis.

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Competition policy challenges for a new U.S. administration: Is the past prologue?

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I. Background: The recent past

1. The new Joseph Biden administration (JBA) will have the opportunity, if it so chooses, to apply American antitrust and competition policy in a manner that promotes economic efficiency, consumer welfare, and economic growth. Antitrust policy formulation, of course, is not made in a vacuum—the past is prologue. The JBA will find in the pipeline a large number of investigations, ongoing enforcement actions, and policy initiatives that will have to be considered as new antitrust priorities are devised.

2. Consistent with the “past is prologue” theme, let us examine U.S. Federal Trade Commission (FTC) enforcement statistics in recent administrations.¹

3. First, consider merger challenges. FTC merger consent decrees accepted for comment included 84 under G. W. Bush (hereinafter “Bush”) (2001–2009), 113 under Obama (2009–2017), and 41 under Trump (2017–2021). FTC merger-specific Part III Administrative complaints (not including dual-track cases where a preliminary injunction was pursued first) numbered 5 under Bush, 2 under Obama, and 4 under Trump. Permanent injunctions were 2 under Bush and 1 under Obama. Preliminary injunctions numbered 17 under Bush, 21 under Obama, and 12 under Trump. Finally, transactions abandoned or restructured—an extremely important measure of cost-efficient merger

enforcement effectiveness—numbered 46 under Bush, 29 under Obama, and 28 under Trump. Aggregating across measures, one finds 154 merger enforcement actions under Bush (about 19 a year), 166 under Obama (just over 20 a year), and 85 under Trump (just over 21 a year). In short, FTC merger enforcement rates were quite consistent across the last three administrations, with the FTC having its best aggregate numbers under President Trump.

4. *Second, non-merger antitrust enforcement. During the second term of the Obama administration (2013–2016), the FTC took 24 non-merger enforcement actions (including 18 consents accepted for comment, 3 injunctions authorized, 2 administrative complaints, and 1 action for an order violation), whereas the Trump administration (2017–2020) took 17 (including 6 consents accepted for comment, 8 injunctions authorized, and 3 administrative complaints). Those numbers are not widely dissimilar, particularly when one considers that the Trump administration litigated administratively and in federal court multiple resource-intensive cases.*

5. *Apart from its vigorous merger and non-merger enforcement, the FTC undertook major policy development initiatives during the Trump administration. Under Chairman Simons, during 2018 and 2019 the Commission convened a pathbreaking set of comprehensive “Hearings on Competition and Consumer Protection in the 21st Century.”² These hearings addressed a large number of “new economy” issues that are transforming antitrust and consumer protection enforcement, such as, for example, common ownership; innovation and intellectual property; data security; privacy, big data, and competition; algorithms, artificial intelligence, and predictive analytics; consumer privacy;*

* The views herein are solely those of the author, they are not attributable to the Federal Trade Commission or any individual Federal Trade commissioner.

1 The discussion in paragraphs 3 and 4 of this article, below, draws upon data compiled by the FTC’s Bureau of Competition and provided to the author on November 17, 2020, by Heather Johnson, senior counsel, Bureau of Competition. Data based on subsequent enforcement actions prior to the publication of this article (except for the Facebook complaint, note 5, *infra*) are not included in the total. Any errors are solely attributable to the author.

2 See Federal Trade Commission, Hearings on Competition and Consumer Protection in the 21st Century (accessed Nov. 24, 2020), available at <https://www.ftc.gov/policy/hearings-competition-consumer-protection>.

monopsony and buyer power; and the antitrust analysis of digital platforms, nascent competition, and labor markets. The record of these hearings will provide valuable information to help inform future antitrust enforcement decisions and policy development. In particular, the interplay between consumer protection and competition law doctrines discussed during the hearings may bear fruit in future “new economy” studies and investigations.

6. *As the hearings ended, the FTC took aggressive steps to focus enforcement on high technology digital economy issues. In particular, in 2019 the FTC rolled out a dedicated Technology Enforcement Division within the Bureau of Competition, focused on cutting-edge digital platform and related high investigations.*³ Also, the FTC issued Special Orders to Alphabet Inc. (including Google), Amazon.com, Inc., Apple Inc., Facebook, Inc., and Microsoft Corp. to provide information and documents on the terms, scope, structure, and purpose of their acquisitions during the ten-year 2010–2019 time period that fell outside the pre-merger notification law.⁴ Information gleaned from these inquiries may prove valuable in assessing how such mergers have affected competitive conditions in giant digital platform markets. Furthermore, the FTC bared its enforcement teeth, charging Facebook with anti-competitive monopolization in violation of Section 2 of the Sherman Act in a December 2020 federal district court complaint.⁵ This suit followed less than two months after “*the [U.S.] Department of Justice — along with eleven state Attorneys General — filed a civil antitrust lawsuit in the U.S. District Court for the District of Columbia to stop Google from unlawfully maintaining monopolies through anticompetitive and exclusionary practices in the search and search advertising markets and to remedy the competitive harms.*”⁶ In sum, the Trump administration left its successor a legacy of significant new initiatives in high-tech digital antitrust enforcement.

7. Furthermore, the FTC and U.S. Department of Justice greatly enhanced the coverage of antitrust policy guidance with the issuance of new Vertical Merger Guidelines in June 2020.⁷ The 2020 Guidelines, which displaced the badly outdated treatment of vertical mergers in the agencies’ 1984 Merger Guidelines, drew

3 Federal Trade Commission, FTC Technology Enforcement Division (accessed Nov. 24, 2020), available at <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition/inside-bureau-competition/technology-enforcement-division>.

4 Federal Trade Commission, FTC to Examine Past Acquisitions by Large Technology Companies (Feb. 11, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies>.

5 Federal Trade Commission, FTC Sues Facebook for Illegal Monopolization (Dec. 9, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>.

6 Department of Justice, Justice Department Sues Monopolist Google for Violating Antitrust Laws (Oct. 20, 2020), available at <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws>.

7 U.S. Department of Justice & The Federal Trade Commission, Vertical Merger Guidelines (June 30, 2020), available at https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

on developments in law and economics as reflected in actual enforcement agency practice in order to provide greater clarity for antitrust practitioners in an increasingly important area of antitrust enforcement. In December 2020, the FTC supplemented the 2020 Guidelines with a set of Commentaries on Vertical Merger Enforcement.⁸ These commentaries, which examine the application of vertical enforcement principles in a variety of agency merger matters, provide further practical insights on the likely future application of the new guidelines. Taken together, these two initiatives are major achievements designed to reduce uncertainty and thereby improve the predictability, efficacy, and efficiency of public U.S. merger enforcement.

8. In addition, the FTC and the U.S. Justice Department recognized the importance of swift action to reduce uncertainty arising out of private sector joint activities to address the COVID-19 pandemic. As explained in a joint March 2020 Statement,⁹ the two enforcers established a system to respond expeditiously to all COVID-19-related requests for antitrust guidance, and to resolve those requests addressing public health and safety within seven calendar days of receiving all necessary information.

9. In short, the Trump administration FTC enjoyed a solid record of antitrust enforcement statistically in line with that of its recent predecessors. What’s more, through public hearings, organizational change, and new guidance (in tandem with the U.S. Justice Department), it acted decisively to move forward aggressively as a top-flight antitrust enforcer and policymaker, despite being subject to tight resource constraints and the major dislocations caused by the COVID-19 pandemic. One hopes that the JBA will take full account of this record of accomplishment as it sets its antitrust enforcement and policy priorities.

II. The future: JBA antitrust priorities

10. As demonstrated above, Trump administration FTC antitrust initiatives refute the claim that antitrust enforcement has been weak during the last four years—as the United States’ second president, John Adams, famously remarked, “*facts are stubborn things.*”¹⁰ Nevertheless, much ink has been spilled recently regarding the need

8 Federal Trade Commission, Commentary on Vertical Merger Enforcement (Dec. 22, 2020), available at https://www.ftc.gov/system/files/documents/reports/federal-trade-commissions-commentary-vertical-merger-enforcement/p180101verticalmergercommentary_0.pdf.

9 Federal Trade Commission, Federal Trade Commission and Justice Department Announce Expedited Antitrust Procedure and Guidance for Coronavirus Public Health Efforts (Mar. 24, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/03/ftc-doj-announce-expedited-antitrust-procedure>.

10 See Founders Online, Adams’ Argument for the Defense: 3–4 December 1770 (“[f]acts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence”), available at <https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016>.

for “stepped-up” enforcement and possible legislative or regulatory changes that are said to be needed to “reinvigorate” the American antitrust enterprise—and the new JBA administration no doubt will give close consideration to such calls. What should it do? As a soon-to-be-former FTC senior staffer, I will offer a few modest suggestions for incoming JBA antitrust officials—not as a defense for what was done in the past, but rather as a warning to avoid pitfalls that would reduce the quality and effectiveness of future American antitrust enforcement.

11. First, a word about innovation and “high-tech” digital platforms, which have been much in the public eye of late. Unquestionably, big tech companies, particularly those that currently possess monopoly power in particular markets, merit antitrust challenge if they act inefficiently (not on the business merits) to exclude new forms of competition or harm the competitive process. The Trump administration Justice Department and FTC’s bringing of monopolization cases against Google and Facebook, noted above, manifested a willingness to apply current monopolization law to challenge specific practices by digital platform giants.

12. But recent suggestions put forth in an October 2020 House Judiciary Subcommittee on Antitrust majority report (HJSMR)¹¹ and in a November 2020 report by the Washington Center for Equitable Growth (WCEGR)¹² (coauthored by various prominent critics of Trump administration antitrust enforcement who served in the Obama administration) would go far beyond application of existing antitrust law to big digital platforms. In particular, the HJSMR proposes taking a highly regulatory approach to digital platforms, including imposing “[s]tructural separations and prohibitions of certain dominant platforms from operating in adjacent lines of business.”¹³ The WCEGR also endorses the use of rulemaking (and, in particular, FTC rulemaking) to tackle significant problems of competition.¹⁴ Rushing into rulemakings on platforms (especially without a clear showing of market failure) poses major risks, however, including, in particular, the creation of disincentives to invest in platform-specific innovation; and the interference with potential efficiency-seeking transactions by platform operators and suppliers of complements (in light of inevitable government second-guessing of platform-related business decision-making). The JBA antitrust team may wish to keep such potential costs in mind in setting competition policy vis-à-vis digital platforms.

13. To address the perceived growth and abuse of market power that are said to afflict the American economy, the HJSMR and WCEGR have also proposed to amend and thereby “toughen” the core antitrust statutes, to alter burdens of proof in litigation, and to bestow a substantial increase in resources on federal antitrust enforcers.¹⁵ The problem of scarce agency resources has long been highlighted by enforcement agency leadership, and certainly merits attention. The call for dramatic systemic change in antitrust enforcement norms, however, should be approached cautiously, with a jaundiced eye. In our common-law-based antitrust system, a major disruption to long-familiar statutory schemes would generate major uncertainty regarding antitrust enforcement principles and substantially disrupt business planning for an indeterminate amount of time. Many welfare-enhancing transactions could be sacrificed. The harm to consumer and producer welfare due to lost socially beneficial business initiatives would be hard (if not impossible) to measure, but nonetheless real. It is certainly possible that such losses would outweigh (perhaps substantially) whatever welfare gains might flow from statutory enforcement “reform.” In other words, it should not casually be assumed that “more and different” antitrust would be an unalloyed benefit. As in all other areas of law enforcement, likely costs as well as purported benefits should be central to the antitrust public policy calculus. (Costs would include, of course, the likelihood and magnitude of “false positives” under the new enforcement regime, not just the reduction in socially beneficial transactions.)

14. The “consumer welfare standard” (CWS)¹⁶ has long been the lodestar for U.S. antitrust enforcement,¹⁷ and has been prominently “socialized” through the International Competition Network to foreign enforcement regimes as a key standard to guide antitrust enforcement policy.¹⁸ The CWS is sufficiently flexible to deal with the modern economy; it is able to incorporate quality and innovation as well as price in its application to new as well as traditional market settings. Perhaps most importantly, the CWS provides a neutral metric to facilitate law enforcement that is mutually understood across jurisdictions and by all the “players” in the antitrust enforcement game. Although they may be imperfect in application, there are economic tools regularly deployed by antitrust enforcers to help them estimate likely effects on consumer welfare associated with transactions under review. (Moreover, as economic science advances, the quality and accuracy of those tools rise.) Accordingly, one hopes that the JBA will reaffirm its adherence to the CWS as central to its

¹¹ See Subcomm. on Antitrust, Commercial and Administrative Law of the Comm. on the Judiciary, Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations (Oct. 6, 2020) (HJSMR), available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

¹² See Washington Center for Equitable Growth, Restoring competition in the United States (Nov. 19, 2020) (WCEGR), available at <https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states>. The authors of this report (Bill Baer, Jonathan B. Baker, Michael Kades, Fiona M. Scott Morton, Nancy L. Rose, Carl Shapiro, and Tim Wu) held a variety of federal government positions in the Obama administration.

¹³ HJSMR at 20.

¹⁴ See WCEGR at 36–40.

¹⁵ See HJSMR at 20–21; WCEGR at 10–14.

¹⁶ Although different scholars propound somewhat varying formulations of the CWS, the leading American antitrust treatise writer, Professor Herbert Hovenkamp, states that “under the consumer welfare (‘CW’) principle, as most people understand it today antitrust policy encourages markets to produce output as high as is consistent with sustainable competition, and prices that are accordingly as low.” H. Hovenkamp, Is Antitrust’s Consumer Welfare Principle Imperiled? 45 *Journal of Corporation Law* 101, 102 (2019), available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2987&context=faculty_scholarship.

¹⁷ The U.S. Supreme Court famously characterized the Sherman Antitrust Act as a “consumer welfare prescription.” *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

¹⁸ See International Competition Network, Competition Enforcement and Consumer Welfare: Setting the Agenda (May 2011), available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/11/SP_CWelfare2011.pdf.

antitrust policy. At this point it appears that the CWS is so well entrenched in antitrust jurisprudence that federal courts would require new and very specific statutory direction in order to displace it.

15. Significantly, however, the HJSMR “*recommend[ed] that Congress consider reasserting the original intent and broad goals of the antitrust laws by clarifying that they are designed to protect not just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals.*”¹⁹ One would hope that the JBA would reject that suggestion and not recommend that Congress enact a multi-factor approach in lieu of the CWS. The problem with considering various economic factors (attractive though it might appear at first blush) is that there is no neutral principle for assigning weights to such divergent interests, nor (even if weights could be assigned) are there economic tools for accurately measuring how a transaction under review would affect those interests. It follows that abandoning the CWS in favor of an ill-defined multi-factor approach would spawn private sector confusion and promote arbitrariness in enforcement decisions, undermining the rule of law. The interests other than consumer welfare listed in the HJSMR are valid ones, but they should be dealt with under other statutory schemes, not under the antitrust laws. (It should also be kept in mind that the CWS in application may advance some of the additional interests highlighted in the HJSMR, such as an open market (eliminating competitive distortions by applying the CWS promotes openness) and worker interests (the CWS supports challenging anticompetitive agreements among employers that harm employees’ interests).)

16. There are, nonetheless, statutory changes that merit (and may well receive) attention by JBA decision makers. For example, in August 2020 testimony before Congress on behalf of the Commission, FTC Chairman Joseph Simons recommended legislation to give the FTC “(1) the ability to seek civil penalties, (2) jurisdiction over non-profits and common carriers, and (3) targeted Administrative Procedure Act (‘APA’) rulemaking authority to ensure the law keeps pace with changes in technology and the market.”²⁰ In his testimony, he also voiced Commission support for legislation (if needed) to clarify the FTC’s authority to obtain monetary relief for consumers under Section 13(b) of the FTC Act.²¹ The scope of that authority is currently being litigated before the U.S. Supreme Court.²²

19 HJSMR at 392.

20 Prepared Remarks of Chairman Joseph J. Simons, Hearing on “Oversight of the Federal Trade Commission,” Senate Committee on Commerce, Science, and Transportation, Aug. 5, 2020, at 2 (“Simons Testimony”), available at https://www.ftc.gov/system/files/documents/public_statements/1578975/simons_-_oral_remarks_hearing_on_oversight_of_ftc_8-5-20.pdf.

21 Simons Testimony at 2–3.

22 See *FTC v. Credit Bureau Center*, 937 F.3d 764 (7th Cir. 2019), petition for cert. granted, 2020 WL 3865251 (July 9, 2020) (No. 19-825); *AMG Capital Management, LLC v. FTC* (9th Cir. 2018), petition for cert. granted (July 9, 2020) (No. 19-508); see also FTC Press Release, Statement of FTC General Counsel Alden F. Abbott regarding Supreme Court Orders Granting Review of Two FTC Matters (July 9, 2020), available at <https://www.ftc.gov/news-events/press-releases/2020/07/statement-ftc-general-counsel-abbott-regarding-supreme-court>.

17. One recommended organizational innovation advanced in the WCEGR also deserves a close look. The WCEGR proposes establishing a White House Office of Competition Policy that, among other responsibilities, “*would coordinate action of executive branch agencies and independent regulatory commissions to tackle endemic competition problems in specific industries[,] monitor the rulemaking process to discourage or prevent rules that unnecessarily inhibit competition[,] [a]nd (. . .) seek to establish more coherent ‘whole government’ competition policies in areas where the authority of agencies overlaps.*”²³ To the extent this Office focuses on overcoming economically inimical regulatory barriers to competition associated with certain federal regulatory schemes, it could reinvigorate competitive forces in key economic sectors and produce substantial gains for the American economy. Furthermore, in advising whether and how to reshape the scope of antitrust policy enforcement, this Office, if created, would do well to recall that rent-seeking may lead to the misuse of antitrust in order to restrict, rather than to promote, competition.²⁴

18. Finally, I will not put forth specific recommendations for the JBA on intellectual property, health care, international antitrust cooperation (a vitally important topic in the globalized economy), and other highly sensitive antitrust topics (though I believe that much could be learned from the effective approaches to those topics advanced by the Trump administration FTC and Justice Department). I would, nevertheless, modestly remind JBA policymakers that (as Supreme Court Justice Breyer has stressed) antitrust is a legal system that could benefit from rules to cope with inevitable error costs;²⁵ and that sound policy should seek to minimize the sum of those costs, including enforcement costs, false positives, and false negatives.²⁶ Moreover, antitrust enforcement is constrained not only by limited resources, but by a body of sophisticated case law based on detailed antitrust principles developed and refined by the judiciary over time (and not easily uprooted on the fly). One trusts that the JBA will keep those realities in mind as it sets forth to right competitive wrongs in the manner it believes best promotes the public interest.

23 WCEGR at 42.

24 See W.J. Baumol and J.A. Ordover, Use of Antitrust to Subvert Competition, 28 *Journal of Law & Economics* 247 (May 1985), available at <https://www.jstor.org/stable/1229094>; R. Young, Antitrust Basics: Corruption and Rent-Seeking, Competitive Enterprise Institute (Aug. 21, 2019), available at <https://cei.org/blog/antitrust-basics-corruption-and-rent-seeking>.

25 See L. B. Greenfield and D. J. Matheson, Rules Versus Standards and the Antitrust Jurisprudence of Justice Breyer, 23 *Antitrust* 87 (Summer 2009).

26 See F. H. Easterbrook, Limits of Antitrust, 63 *Texas Law Review* 1 (1984). See also T.A. Lambert and A. F. Abbott, Recognizing the Limits of Antitrust: The Roberts Court Versus the Enforcement Agencies, 11 *Journal of Competition Law & Economics* 791 (2015), available at <http://jcle.oxfordjournals.org/content/early/2015/09/14/joclec.nhv020.abstract>.

III. Conclusion

19. U.S. antitrust enforcement is a mature enterprise, shaped by a long history of incremental common law development, evolving policy perspectives, and marginal adjustments in enforcement direction that reflect changes in the economy and in economic science. In setting new antitrust priorities, any new American administration must take into account what has occurred, both in the immediate past and over a longer period of time. The facts support the proposition that antitrust enforcement was far from moribund during the Trump administration—indeed, Trump antitrust enforcement (certainly

at the FTC) represented an orderly and vigorous continuation of prior enforcement trends. Furthermore, significant policy initiatives were pursued at the FTC and Justice Department over the last four years. Of course, the JBA will advance its own new antitrust agenda and doubtless call for a change in direction in some (perhaps many) aspects of antitrust enforcement, as is its prerogative. But in doing so one would hope that it would be respectful of the lessons of the past, and mindful of the constraints that have served to channel antitrust in a positive direction, consistent with the interest of consumers and a vibrant competitive process. ■

What's old is new again

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1. The same month Donald Trump was inaugurated as president, the *Yale Law Journal* published a student note about whether the antitrust laws as now enforced were capable of effectively regulating the modern economy.¹ In short, the author, Lina Khan, then a student at Yale Law School and before that a researcher at the New America Foundation's Open Markets Initiative,² did not think they could.

2. Her ideas, which marked a departure from the recent, relative consensus around antitrust enforcement, but which in other ways harken back to earlier periods of antitrust enforcement, were not expected to find much currency in the incoming Trump administration, and for the most part they did not—at least at first.

3. But Khan's ideas did find receptive audiences elsewhere—at the Federal Trade Commission, where she was an advisor to Commissioner Rohit Chopra, and the House Judiciary Committee, where she served as counsel to the majority on the Antitrust, Commercial, and Administrative Law subcommittee, where she helped with the committee's investigation into "Big Tech."

4. Others, like Tim Wu at Columbia Law School and Matt Stoller at the Open Markets Institute, also advocated for a more interventionist—and aggressive—role for antitrust, again particularly when it came to regulating technology firms.³

5. And despite the fact that by many measures the Trump administration's antitrust enforcement record was lacking, eventually some of the ideas that Khan, Wu, Stoller, and others promoted made their way into the Trump administration's antitrust thinking—where even though the administration might not have shared the new antitrust's ideological outlook, it shared the same targets.

6. As a result, in the last months of the Trump administration, we saw the U.S. Department of Justice Antitrust Division launch a suit against Google that many in left-leaning antitrust circles have applauded,⁴ and the FTC, in a 3–2 vote, authorized the filing of a complaint against Facebook challenging its past acquisitions of potential rivals under the Clayton Act. Two of the FTC's Republican commissioners voted against authorizing the complaint, but the FTC's chair, Joseph Simons—a Republican—voted in favor. The Antitrust Division's case against Google perhaps was not the only legacy it will leave to the Biden administration. Its challenge to the *AT&T/Time Warner* merger—even though unsuccessful—promoted some of the theories about vertical mergers that the new antitrust's proponents had said should be enforced.⁵ And it issued, along with the FTC, vertical merger guidelines, a subject the agencies last addressed in 1984. Of course, the Trump administration's overall record on antitrust enforcement was mostly a disappointment to those who hoped for more vigorous enforcement—its failure to challenge the merger between Sprint and T-Mobile is a prominent example.⁶

7. Some of the Trump administration's decisions are likely to shape the early days of antitrust enforcement in the Biden administration. It seems unlikely that the new administration—whose transition team includes a number of folks who have applauded the case or called for similar investigations—will drop the *Google* case or let it die a slow death as the Bush administration did with the case against Microsoft initiated under President Clinton. Investigations into tech firms, like Apple and Amazon, will likely continue, as Wu and others who share similar views are advising Biden's transition team.

1 L. Khan, Amazon's Antitrust Paradox, 126 *Yale L. J.* 710 (2017).

2 D. Streitfeld, Be Afraid, Jeff Bezos, Be Very Afraid, *N.Y. Times*, Section BU, at 1 (Sept. 9, 2018).

3 T. Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports, 2018); M. Stoller, *Goliath: The 100-Year War Between Monopoly Power and Democracy* (Simon & Schuster, 2019).

4 M. Stoller, The Google Suit: We're All Anti-Monopolists Now, *BIG* (Oct. 21, 2020), <https://mattstoller.substack.com/p/the-google-suit-were-all-anti-monopolists>.

5 N. Krishan, The Government's Failure to Block the AT&T Time Warner Merger Could Lead to Even Bigger Monopolies, *Mother Jones* (Mar. 7, 2019), <https://www.motherjones.com/politics/2019/03/att-time-warner-doj-donald-trump-monopolies>.

6 American Antitrust Institute, The State of Antitrust Enforcement & Competition Policy in the U.S. (Apr. 14, 2020), https://www.antitrustinstitute.org/wp-content/uploads/2020/04/AAI_StateofAntitrust2019_FINAL3.pdf.

8. But perhaps the biggest and most significant change from the current administration will not be in the Biden administration's pursuit of new (or reinvigorated) antitrust theories, but instead in an increase of more traditional antitrust enforcement—that is, addressing the problem not that we need new antitrust laws, but that we simply need to more aggressively enforce the ones we already have. We may very well see this play out through the enforcement of those laws in novel ways, such as by focusing on the effects mergers may have on labor markets. And it is likely that an administration focused on issues about income inequality would be particularly interested in investigating such issues.

9. Still, there is some chance that the laws may change—as some in Congress are attempting to amend the antitrust laws to address issues where they view current antitrust law as having gaps, although that may depend on the still-undecided question of which party will control the Senate.

10. And even should the Biden administration's antitrust efforts fall short of what more progressive antitrust thinkers hope they should be, the next four years are likely to continue to see increased and often independent action from state attorneys general, who have in the recent past challenged mergers that the DOJ has cleared, as in the case of *Sprint-T-Mobile*, as well as challenging practices that the DOJ views as often procompetitive, as in the Washington attorney general's investigation into no-poaching provisions in franchise agreements.

11. But whatever the next four years hold, we can safely predict one thing—we do not think President Biden will tweet when new investigations are launched. ■

Biden/Harris expected to double down on antitrust enforcement: No “*Trump card*” in the deck

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1. Conventional wisdom on antitrust enforcement is that Democrats are more interventionist than Republicans, which, at face value, suggests that there will be an uptick in enforcement under President Biden. But convention alone does not tell the whole story as a number of dynamics will influence antitrust policy during the Biden administration.

2. Antitrust policy under the Trump administration was anything but conventional, as Trump maintained a much more populist agenda than previous Republican administrations and was far more politically charged than any administration in recent memory. Due to Trump’s hyped-up rhetoric on antitrust relative to other Republican administrations, the “gap” between Trump and Biden may not be as pronounced as other transitions from one party to another, though we should expect more predictable enforcement, less influenced by political pressures, at least on individual matters.

3. As a baseline to forecast the antitrust climate under the Biden administration, we look to the current temperature of the political and regulatory environment, which is red hot. In modeling predictions for Biden’s approach, we examine the previous records of Joe Biden and Kamala Harris during their tenure in public office, which does not unlock many meaningful revelations standing alone but provides no reason to believe that the Biden administration will turn the current temperature down.

4. Layering onto that, we assess the public statements of Biden and Harris on the campaign trail, which portend increased focus on antitrust. Analyzing the composition of the leadership of the transition teams for the Federal Trade Commission (FTC) and US Department of Justice (DOJ) further reinforces expectations for heightened antitrust enforcement under Biden. With these data points piled on top of conventional wisdom, we foresee no reduction in enforcement and potential for a moderate uptick.

5. When we can expect to see changes at the DOJ and FTC is a real question. The answer, explored below, depends on a number of externalities that cannot be known with certainty.

6. What seems most clear is that we can expect a return to an antitrust administration that is less politically charged than Trump’s, without “Trump cards” being thrown in the mix by the White House or DOJ leadership.

7. Our final prognostication is that there is some potential for bipartisan revisions to antitrust legislation during Biden’s tenure, but a massive sea change in the laws or the process which some have advocated is unlikely.

I. Political winds fanning flames in favor of more robust antitrust enforcement

8. Even before the most recent election, there has been a shift in political will and federal agencies' willingness to pursue aggressive antitrust enforcement. By all objective metrics, antitrust is entering the public consciousness in a way not seen for years. In particular, antitrust is viewed as key to addressing what some see as high pharmaceutical prices and powerful tech companies and life science companies allegedly stamping out nascent competitors.

9. Members of Congress on both the left and right are pushing a more aggressive antitrust agenda. Most recently, the Subcommittee on Antitrust Law of the House Judiciary Committee issued the Digital Competition Report concluding “[antitrust] laws must be updated to ensure that our economy remains vibrant and open in the digital age,” and that “the antitrust agencies failed, at key occasions, to stop monopolist from rolling up their competitors and failed to protect the American people from abuses of monopoly power.”¹

10. Down Pennsylvania Avenue, in response to these political winds, the DOJ and FTC have recently filed monopolization suits against some of the biggest tech companies and are aggressively suing to stop so-called “killer acquisitions” of nascent competitors. For example, the FTC in December 2020 filed to block Procter & Gamble’s proposed acquisition of Billie, a startup direct-to-consumer company that only started selling women’s razors and body care products in November 2017. In announcing the complaint, the director of the FTC’s Bureau of Competition stated, “As its sales grew, Billie was likely to expand into brick-and-mortar stores, posing a serious threat to P&G. If P&G can snuff out Billie’s rapid competitive growth, consumers will likely face higher prices.”²

11. Earlier, the FTC alleged Illumina’s proposed acquisition of PacBio would allow Illumina to maintain its “longstanding monopoly” in next-generation DNA sequencing by extinguishing PacBio as a “nascent competitive threat.”

12. The agencies have also opened investigations into a number of high-tech companies, and several have drawn aggressive lawsuits. Both the FTC and DOJ, along with state attorneys general, have filed high-profile suits

accusing the tech companies of monopolizing various markets and seeking remedies ranging from injunctions against future conduct to divestitures of previously acquired assets.

13. There is now bipartisan support for additional funding for the DOJ Antitrust Division and FTC, suggesting there will be even more enforcement in the future. Indeed, Commissioner Rebecca Slaughter dissented from the FTC’s 2021 budget request to Congress because she thought “*more funding is necessary to meet the increasing demands on the FTC to protect American consumers.*” Republican Commissioner Christine Wilson recently said: “*I agree that the budgets of the FTC and the DOJ should be increased to keep up with the size of the economy that we are policing. So, a much larger budget would be appreciated.*”

14. These views are being echoed in the halls of Congress on both sides of the aisle, as House Democrats and Republicans are calling for increased funding for the antitrust agencies in recent months. Among several recommendations for antitrust enforcement in the Digital Competition Report, the House Judiciary Committee recommended “*increasing the budgets of the FTC and the Antitrust Division.*” Even the Republican Minority Report responded that the “*report makes a good case for the need to strengthen our nation’s antitrust agencies with regard to resources. We agree wholeheartedly with this recommendation.*” Indeed, the recently-enacted omnibus spending bill increased the FTC budget by 6% and the DOJ Antitrust Division budget by 11% in FY21 compared to FY20, giving both agencies more funds to hire staff and conduct investigations.

II. Biden and Harris: What does the record reflect?

15. In this already-supercharged political environment, to understand how the Biden administration is likely to approach antitrust enforcement, it is useful to consider both Biden’s and Harris’s history.

16. Biden’s record in the Senate, including 36 years on the Senate Judiciary Committee, suggests he is a moderate, consistent with his position on many issues, but reveals relatively little about what the Biden administration is likely to do on antitrust over the next four years. Early in his career, Biden voted for the Hart–Scott–Rodino Act, which established the federal mandatory premerger notification program. On the other hand, he joined Republicans in opposing a bill that would have reversed the Supreme Court’s 1977 decision in *Illinois Brick*, which prohibits indirect purchasers from recovering antitrust damages.

1 Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, October 2020, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf (the “Digital Competition Report”).

2 Press Release, Federal Trade Commission, FTC Sues to Block Procter & Gamble’s Acquisition of Billie, Inc., December 8, 2020, <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-block-procter-gambles-acquisition-billie-inc>.

17. Harris's record on antitrust enforcement may be more revealing. In her role as California attorney general, Harris focused the spotlight on healthcare and pharmaceuticals, including suing to block the proposed merger of Anthem and Cigna, as well as the merger between St. Luke's HealthCare System and Saltzer Medical Group. She was also active in antitrust litigation in the pharmaceutical industry, securing settlements in so-called "pay for delay" litigation and submitting briefs advocating that courts find antitrust violations for other conduct by pharmaceutical companies.

18. On the campaign trail, Biden seemed to foreshadow a more interventionist approach. For example, in a March 2020 interview with the Associated Press, he said "*I don't think we spend nearly enough time focusing on antitrust measures. And the truth of the matter is, I think it's something we should take a really hard look at.*"³

19. Harris's campaign soundbites on antitrust also portend more aggressive enforcement, particularly aimed at high tech. In 2019, for example, she was quoted in a *New York Times* interview arguing for regulation of the industry, stating, "*I believe the tech companies have got to be regulated. My first priority [should she be elected president] is going to be that we ensure that privacy is something that is intact and that consumers have the power to make decision about what happens with their personal information.*"⁴

III. Reading the transition team tea leaves

20. Biden's early moves on the antitrust front as president-elect also suggest he will take a somewhat more aggressive enforcement bent. His appointments to the FTC transition team include Bill Baer, former assistant attorney general in charge of the Antitrust Division during the Obama administration, and Heather Hipsley, former deputy general counsel and chief of staff to FTC Chair Edith Ramirez. Baer co-authored a report in November 2020 concluding that the "*next administration should seek to revitalize antitrust enforcement with a focus on strengthening deterrence. The president must appoint agency leaders who recognize that market power is a serious problem, understand that economic research supports more aggressive enforcement, and above all, believe that business as usual will not suffice.*"⁵

3 C. Marx, Antitrust policy wasn't a priority for Biden before hitting campaign trail, MLex US, March 30, 2020, <https://www.mlexwatch.com/articles/7800/print?section=ftcwatch>.

4 Meet the Candidates: Kamala Harris, *NY Times*, November 2019, <https://www.nytimes.com/interactive/2019/us/politics/kamala-harris-2020-campaign.html>.

5 Washington Center for Equitable Growth, Restoring competition in the United States, November 2020, <https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states>.

21. Gene Kimmelman, who was chief counsel for the DOJ's Antitrust Division under President Obama, is also on the DOJ transition team. Kimmelman has most recently worked at Public Knowledge, a nonprofit that describes its mission as "*promot[ing] freedom of expression, an open internet, and access to affordable communications tools and creative works.*" At Public Knowledge, Kimmelman has advocated for more antitrust scrutiny of big tech companies.

22. Ultimately, the tone will be set most directly by those appointed to lead the Antitrust Division and Federal Trade Commission, and while various names have been promoted in the antitrust press, that is little more than speculation.

23. Both the FTC and DOJ transition teams can be expected to recommend aggressive agency leaders for DOJ and the FTC to push the enforcement agenda to a heightened level.

IV. Current FTC composition may slow leadership changes under Biden

24. One of the most influential decisions that a president makes on antitrust enforcement is selecting leadership at both the DOJ's Antitrust Division and FTC. At the DOJ the president appoints an assistant attorney general for antitrust and at the FTC the president appoints five commissioners. All appointments require confirmation by the Senate, which can sometimes lead to delays.

25. Timing for DOJ appointments can move very quickly or be delayed by the Senate for months, but typically is complete in the first year of a new presidency. President Trump did not nominate his selection for assistant attorney general, Makan Delrahim, until April 7, 2017, after Delrahim served as a White House counsel early in the Trump administration to help guide the Gorsuch nomination to the Supreme Court. Delrahim was confirmed on September 27, 2017, though his deputies, which did not require confirmation, were appointed to leadership positions sooner. Obama's assistant attorney general appointment, Christine Varney, was approved even quicker: she was nominated on February 23, 2009 and confirmed on April 20, 2009.

26. At the FTC, there is substantial uncertainty about how quickly President Biden can get new commissioners in place. Since FTC commissioners serve six-year terms, absent a resignation, it is possible that the FTC will remain controlled by Republicans 3–2 through September 2023, as that is the earliest that any of the current Republican commissioners' terms expire. On the Democratic side, Rohit Chopra's term has already expired, though he

may continue to serve until a successor is confirmed by the Senate, and Rebecca Slaughter's term will expire in September 2022.

27. If past is prologue, however, FTC Chair Joe Simons may leave the agency, allowing Biden to appoint a Democrat to take his place. Even if Simons does not step down, Biden could name one of the two sitting Democrats, Chopra or Rebecca Slaughter, as chair or acting chair, as soon as the day he is inaugurated. And Biden could then nominate a commissioner to take Chopra's seat and name that commissioner to the chair role. There is some speculation that Chopra may be nominated to a role at the Consumer Financial Protection Bureau, which increases the likelihood that the latter may happen.

28. There is also precedent for Simons, considered a moderate, to remain chair until Biden appoints a new commissioner as chair. Janet Steiger, chair under President George H. W. Bush, remained as chair under Clinton until Robert Pitofsky was nominated and confirmed to the Commission, and became chair in 1995, two years after Clinton was inaugurated in 1993.

29. Regardless of whether Biden nominates a new chair, the three current Republican commissioners could continue to wield influence as long as they continue to hold a majority. All enforcement actions require a majority vote of the commissioners, and so the Democrats would not be able to vote out any actions without at least one Republican on board. Even the appointment of the FTC Bureau directors for the Bureaus of Competition, Consumer Protection and Economics requires a vote by the Commission and so it is at least possible that the Republicans could block would-be appointees.

V. No “Trump cards”: Reduction in the perceived role of politics in antitrust enforcement

30. Since the Nixon administration I.T.T. and milk antitrust scandals, there has been a long-standing tradition of presidents and their administrations taking great care not to even appear to allow politics to influence antitrust enforcement. Of course, presidents have always had some influence over antitrust policy insofar as the president's nominees set the tone, but after those appointees were in place, presidents, and even their attorney generals, have only rarely interfered in specific investigations or cases.

31. The Trump administration broke with that norm, both at the presidential and at the AG levels. For example, Trump met with the CEO of AT&T while the DOJ was reviewing the company's acquisition of Time Warner and there were assertions that the DOJ's decision to challenge the transaction was due in part to Trump's distaste for CNN. Trump also tweeted his disapproval of automobile emissions standards announced by California with four major automakers, the day after which the DOJ Antitrust Division opened an investigation.

32. There were also allegations by a whistleblower that Attorney General Bill Barr ordered an in-depth probe of ten cannabis industry mergers “*not [based] on an antitrust analysis, but because he did not like the nature of their underlying business.*”

33. The Biden administration has already signaled that it will return to a “hands-off” approach to the DOJ. In an interview with CNN, Harris pledged that “[w]e will not tell the Justice Department how to do its job,” which Biden affirmed, “*I guarantee that's how it'll be run.*”

VI. Dramatic antitrust legislation unlikely, though expect some legislative movement

34. Progressives in Congress are pushing a more aggressive antitrust enforcement agenda. As discussed above, the Subcommittee on Antitrust Law of the House Judiciary Committee recently issued a report calling for the antitrust laws to be updated. The Digital Competition Report proposed several reforms, including “[s]trengthening Section 7 of the Clayton Act, including through restoring presumptions and bright-line rules, restoring the incipency standard and protection nascent competitors, and strengthening the law on vertical mergers.” The Committee also proposed “[s]trengthening Section 2 of the Sherman Act, including by introducing a prohibition on abuse of dominance and clarifying prohibitions on monopoly leveraging, predatory pricing, denial of essential facilities, refusals to deal, tying, and anticompetitive self-preferencing and product design.”⁶

35. Democrats have also been active on the Senate side. For example, Democratic Senator Klobuchar has also proposed legislation, the Anticompetitive Exclusionary Conduct Prevent Act, that, among other things, would amend the Clayton Act to prohibit “*exclusionary conduct,*” defined as conduct that “*presents an appreciable risk of*

⁶ Digital Competition Report, *supra* note 1.

harming competition” and would create a presumption that conduct is exclusionary if undertaken by a company with a greater than 50% share in the relevant market.⁷

36. While House Republicans released a minority response largely supporting Democrats’ findings, they expressed concerns about sweeping solutions and instead advocated for refinements to current law.⁸ For example, regarding nascent competition, the minority response to the Digital Competition Report explained that “*Congress should look to reinvigorate the antitrust enforcement agencies’ ability to conduct proper oversight and bring enforcement cases based on potential competition doctrine. This may require legislation restoring the potential competition doctrine to its original Congressional intent while freeing it from its current overly restrictive standards.*” The minority response also agreed that “[c]onservatives should consider supporting very limited legislative changes to provide consumers with a data portability standard that is similar to transferring cell phone numbers.”

37. There is also pending legislation introduced by Republicans that would more closely align FTC and DOJ processes (the SMARTER Act) and that would combine the agencies (the One Agency Act).

38. Current leadership at the agencies appear to agree with the Republicans’ more cautious approach. For example, Chairman Joe Simons, while having touted himself as “*responsible for overseeing the re-invigoration of the FTC’s non-merger enforcement program*” during his tenure as director of the FTC Bureau of Competition under Bush, has pushed back on these “expanded” theories of antitrust harm. For example, he argued in January 2020 that “*U.S. antitrust laws are sufficiently robust to handle competition problems as they arise. Over the years, antitrust laws have proven to be very flexible and resilient in enabling enforcers to challenge conduct that harms competition in a broad range of markets. These laws have proved themselves effective even as the economy evolved with technological progress.*”⁹

39. Given this disagreement, and that the Democrats, at best, will have a very thin majority in the Senate, we anticipate some modest modifications to the antitrust laws but expect serious pushback to substantial overhauls of the system or laws. ■

⁷ Press Release, Klobuchar Introduces Legislation to Deter Anticompetitive Abuses, March 10, 2020, <https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=E59886E1-12EE-48A5-94F5-044658A75513>.

⁸ The Third Way, Response to Majority Staff Reporting and Recommendations on Investigation of Competition in Digital Markets, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, October 2020, https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf.

⁹ CPI Talks... with Joseph Simons, *Competition Policy International*, January 15, 2020, <https://www.competitionpolicyinternational.com/cpi-talks-17-with-joseph-simons>.

Pharmaceutical antitrust: What the Biden administration can do

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1. Consumers suffer from high drug prices. They overpay by billions. They split pills in half. They don't take needed medicines. What can a Biden administration do? A lot.

2. This essay discusses four types of behavior the administration can address: "pay for delay" settlements, "product hopping," biosimilar blockades, and an ever-expanding frontier of new anticompetitive behavior. I focus on the Federal Trade Commission (FTC or Commission), the agency that has most directly addressed the pharmaceutical industry.

3. In addition to the issues discussed in the essay, Congress can play a crucial role in the next four years to make consumers' lives better while not harming innovation. In particular, it can pass bipartisan legislation introduced in the 116th Congress on settlements,¹ product hopping,² "patent thickets,"³ and citizen petitions.⁴

I. Settlements

4. The first type of conduct the Biden administration can address involves settlements by which brands pay generics to settle patent litigation and delay entering the market. The FTC was on the forefront of recognizing the harms from pay-for-delay settlements two decades ago. And it has doggedly pursued the issue, in particular between 2005 and 2012 when courts gave a free pass to this conduct.

5. The Commission's efforts culminated in the crucial 2013 victory in *FTC v. Actavis* in which the Supreme Court held that these agreements could have "significant anticompetitive effects" and violate the antitrust laws.⁵ Since the decision, courts have begun to flesh out the *Actavis* framework. They have determined what counts as payment, considered an appropriate antitrust framework, and analyzed issues related to patents and causation.⁶

6. While much of the law has developed in the courts, in *In the Matter of Impax Laboratories*, the FTC weighed in, offering a ringing bipartisan (5-0) condemnation of pay-for-delay settlements.⁷ In *Impax*, the Commission explained that payment extends beyond cash and includes several forms of compensation that the brand firm provided to the generic, including a promise not to introduce an "authorized generic" that would compete with the true generic. The FTC also recognized the "probabilistic" nature of patent settlements, with a plaintiff only needing to show "the elimination of the risk of competition, not proof that entry would actually or probably have occurred earlier."⁸ And it recognized that the settling parties must connect the benefits they proffer to the challenged restraint, as opposed to the agreement as a whole, which makes sense since "[a] contrary rule would allow parties to skirt liability for anticompetitive behavior by inserting unrelated provisions into their contracts and claiming that those provisions benefited competition."⁹ The ruling is currently on appeal to the U.S. Court of Appeals for the Fifth Circuit.

5 133 S. Ct. 2223, 2237-38 (2013).

6 See H. Hovenkamp, M. D. Janis, M. A. Lemley, C. R. Leslie & M. A. Carrier, *IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW*, CHAP. 16 (Wolters Kluwer, Supp. 2019).

7 FTC (Mar. 28, 2019), available at: https://www.ftc.gov/system/files/documents/cases/d09373_impax_laboratories_opinion_of_the_commission_-_public_redacted_version_redacted_0.pdf.

8 *Ibid.*, at 23.

9 *Ibid.*, at 36, n. 40.

1 H.R. 1499, the Protecting Consumer Access to Generic Drugs Act of 2019; S. 64, Preserve Access to Affordable Generics and Biosimilars Act, S. 3092, Expanding Access to Low-Cost Generics Act of 2019.

2 S. 1416, Affordable Prescriptions for Patients Act of 2019.

3 S. 1416, Affordable Prescriptions for Patients Act of 2019 (initial version).

4 S. 1895, Lower Health Care Costs Act; S. 1224, Stop STALLING Act; S. 660, Efficiency and Transparency in Petitions Act.

7. The FTC also brought a case challenging a payment taking the form of a generic's underpayment for brand products. In particular, it claimed that Abbott paid Teva to delay entering the market with a generic version of testosterone gel AndroGel by providing Teva with an authorized generic version of cholesterol drug TriCor at "a price that is well below what is customary in such situations."¹⁰ The Third Circuit found that the plaintiff alleged a "plausibly 'large'" payment in the form of an "extremely valuable" supply of TriCor anticipated to lead to net sales of "nearly \$175 million over a four-year period."¹¹

8. While the FTC has astutely recognized the various forms that pay-for-delay settlements can take, it needs to continue its vigor. The next generation of anticompetitive settlements promises to be even more nuanced. In its annual reports, the Commission has found that while the total number of settlements has increased, the number that involves payment and delayed entry has significantly fallen. The most recent report found that between FY 2012 and FY 2017, the total number of settlements increased from 140 to 226 but the number involving payment higher than litigation costs and delayed generic entry fell from 33 to 3.¹² While that is a positive development, eight settlements contain "possible compensation," with the effect unclear because of the agreement's complexity.¹³ The FTC continually needs to be on the lookout for anticompetitive payments lurking in ever more obscure corners.

II. Product hopping

9. A second issue that threatens harms in the pharmaceutical industry is "product hopping," which occurs when a brand firm switches from one version of a drug to another. Most reformulations, especially those made when a generic is not about to enter the market, do not raise significant anticompetitive concerns. But some do. By reformulating a drug and switching the prescription base to the new product, a brand firm could evade regulatory regimes designed to encourage generic entry—namely, the Hatch-Waxman Act (which allows generics to rely on brand firms' clinical studies) and state drug product substitution laws (which allow or require pharmacists, absent a doctor's contrary instructions, to substitute generic versions when brands are prescribed).¹⁴

10. The courts have distinguished between "hard switches," viewed as anticompetitive because the brand removes

the original drug from the market, and "soft switches," viewed as not concerning because the original remains on the market.¹⁵ But this distinction should not be accorded dispositive significance, as both types of behavior could violate antitrust law.

11. In particular, even when a brand firm leaves the original drug on the market, it can harm competition by combining a reformulation that destroys generic substitutability with an encouragement to write prescriptions for the reformulated (rather than original) product when the only reason is to impair generic entry.¹⁶ Because these soft switches could present competitive concern, the FTC should consider challenging this conduct. The Commission's first activity in this area was a \$50 million settlement with Reckitt Benckiser for shifting prescriptions for opioid-addiction-treating Suboxone from a tablet to a film version while falsely claiming that the film version was safer.¹⁷ The FTC should continue its efforts by engaging in activities like bringing a case, filing amicus briefs,¹⁸ issuing guidelines, or holding hearings. Given the nuanced harms of soft switches, the attention of the leading agency focused on drug competition would be valuable.

III. Biosimilar blockades Biosimilar blockades

12. The conduct discussed above has applied primarily to brand-name small-molecule drugs. More complex biologics, the next wave of pharmaceutical products, offer pathbreaking advances treating cancer, arthritis, chronic diseases, and other conditions.

13. As I have explained elsewhere,¹⁹ biosimilars face at least six barriers to entry. First is the cost of developing a biosimilar, which runs in the hundreds of millions of dollars. Second are patent thickets consisting of dozens of, if not more, patents. The most prominent example is AbbVie's Humira, which treats immune-related diseases, and which is covered by more than 100 patents. Third is trade secrets. The process of manufacturing biologics

10 *FTC v. AbbVie Inc.*, 107 F. Supp. 3d 428, 436 (E.D. Pa. 2015).

11 *FTC v. AbbVie Inc.*, 2020 WL 5807873, at *18 (3d Cir. Sept. 30, 2020).

12 FTC Bureau of Competition, Overview of Agreements Filed in FY 2017, at 6, https://www.ftc.gov/system/files/documents/reports/agreements-filed-federal-trade-commission-under-medicare-prescription-drug-improvement-modernization/mma_report_fy2017.pdf.

13 *Ibid.*, at 1–2.

14 M. A. Carrier, A Real-World Analysis of Pharmaceutical Settlements: The Missing Dimension of Product Hopping, 62 *Fla. L. Rev.* 1009, 1013, 1017 (2010).

15 *Compare Abbott Laboratories v. Teva Pharmaceuticals USA, Inc.*, 432 F. Supp. 2d 408 (D. Del. 2006) (denying motion to dismiss in context of hard switch) with *Walgreen Co. v. AstraZeneca Pharmaceuticals*, 534 F. Supp. 2d 146 (D.D.C. 2008) (granting motion to dismiss in context of soft switch).

16 M. A. Carrier and S. Shadowen, Product Hopping: A New Framework, 92 *Notre Dame L. Rev.* 167 (2016).

17 *FTC, Indivior Inc.*, July 24, 2020, <https://www.ftc.gov/enforcement/cases-proceedings/1310036/indivior-inc>.

18 *See, e.g.*, Brief for Amicus Curiae Federal Trade Comm'n in Support of Plaintiff-Appellant Mylan Pharms. Inc.'s Petition for Rehearing and Rehearing En Banc (3d Cir. Oct. 19, 2016).

19 Biosimilar Industry Experts Highlight 2019 Triumphs, Tribulations, Dec. 11, 2019, <https://www.biosimilardevelopment.com/doc/biosimilar-industry-experts-highlight-triumphs-tribulations-0001>.

is complex and involves path-dependent choices, which increases the hurdles posed by trade secrets that prevent biosimilars from accessing needed information.

14. Fourth, there have been no FDA designations of interchangeable biosimilars, which can be automatically substituted for biologics. In the meantime, biologic manufacturers have been advocating for state laws on interchangeability that impose hurdles beyond those in the brand/generic setting, such as requirements of record-keeping, doctor notification, and even doctor approval. Fifth, biologic manufacturers have raised questions about biosimilars by making false and misleading representations claiming that biosimilars are “not identical,” that “patients (. . .) react differently,” and that biosimilars only “wor[k] in a similar way.”²⁰

15. Sixth, biologic manufacturers have used contracting practices that make it difficult for biosimilars to enter the market. Pfizer, for example, has challenged conduct by which Johnson and Johnson (J&J) sought to protect Remicade. Pfizer targeted J&J’s exclusive contracts that excluded its biosimilar Inflectra from drug formularies. Pfizer also challenged rebates that made it harder for Inflectra to gain new patients by requiring the bundling of existing patients (not likely to switch to a biosimilar) with new patients (more likely to switch).

16. Some of these hurdles lie outside the range of what the FTC could address. But the agency has been proactive in weighing in on some of these issues. For example, it issued civil subpoenas to J&J regarding its contracting practices related to Remicade.²¹ And it filed an amicus brief in a private lawsuit challenging Humira’s patent thicket as an antitrust violation, highlighting the Supreme Court’s instruction in *Actavis* not to defer to the policy of encouraging settlements or treat as automatically procompetitive a generic’s entry (after being paid) before the end of the patent term.²²

17. The FTC also collaborated with the U.S. Food and Drug Administration (FDA) to issue a joint statement and hold a conference on biologic companies’ disparagement of biosimilars.²³ In their statement, the agencies demonstrated their “inten[t] to take appropriate action against false or misleading communications about biologics, including biosimilars.”²⁴ The agencies promised

that “if a communication makes a false or misleading comparison between a reference product and a biosimilar in a manner that misrepresents the safety or efficacy of biosimilars, deceives consumers, or deters competition, FDA and FTC intend to take appropriate action.”²⁵

18. Given these wide-ranging and robust hurdles, the FTC should continue—and expand—its efforts to foster biosimilar competition.

IV. The next frontier

19. Every drug company profiting from a patented drug faces a moment of reckoning: the time its patent expires and it is subject to generic competition. Not surprisingly, the companies do everything they can to delay that moment as long as possible. The variety of conduct in which drug companies have engaged is wide-ranging and always changing. The FTC needs to be on its toes.

20. For example, who could have imagined in 2017 that the industry would reach into its bag of anticompetitive tricks to pull out. . . tribal immunity? Yes, Allergan transferred patents covering its dry-eye medicine Restasis to the Saint Regis Mohawk Tribe in an attempt to avoid review at the Patent Office.²⁶ Such a shameless attempt to exploit immunity developed for a different purpose was not successful, as the Federal Circuit held that tribal immunity did not apply to the proceedings at issue.²⁷ But it is a reminder of drug firms’ creativity in avoiding competition.

21. The latest ruse involves convincing courts to jettison a vital pathway by which generics have reached the market. In settings in which a drug can be used to treat multiple conditions, a generic can “carve out” the patented indications from its label.²⁸ The resulting “skinny label” allows the generic to launch its product for uses not covered by the patent.

22. In October 2020, a Federal Circuit panel found that this long-recognized practice could form the basis for induced infringement, even though, as Chief Judge Prost explained in a 33-page dissent, generic company Teva “did everything right.”²⁹ The dissent worried that the ruling rendered the “‘content’ of Teva’s skinny label alone (. . .) sufficient to prove induced infringement—even though Teva’s skinny label did not encourage, promote, recommend, or even suggest the patented method.”³⁰

²⁰ Pfizer Inc. Citizen Petition, Aug. 22, 2018, https://www.bigmoleculerwatch.com/wp-content/uploads/sites/2/2018/08/Citizen_Petition_from_Pfizer.pdf.

²¹ J&J says FTC probing efforts to protect arthritis drug Remicade, July 29, 2019, <https://www.reuters.com/article/us-johnson-johnson-ftc-antitrust/jj-says-ftc-probing-efforts-to-protect-arthritis-drug-remicade-idUSKCN1U027Q>.

²² Brief of Amicus Curiae The Federal Trade Commission in Support of No Party, UFCW Local 1500 Welfare Fund et al. v. AbbVie, Inc., at 2–3 (7th Cir. filed Oct. 13, 2020), https://www.ftc.gov/system/files/documents/amicus_briefs/ufcw-local-1500-welfare-fund-et-al-v-abbvie-inc-et-al/ufcw_local_1500_welfare_fund_amicus_brief.pdf.

²³ Public Workshop: FDA/FTC Workshop on a Competitive Marketplace for Biosimilars, Mar. 9, 2020, <https://www.fda.gov/drugs/news-events-human-drugs/public-workshop-fda-ftc-workshop-competitive-marketplace-biosimilars-03092020-03092020>.

²⁴ Joint Statement of the Food & Drug Administration and the Federal Trade Commission Regarding a Collaboration to Advance Competition in the Biologic Marketplace, at 5, Feb. 3, 2020, <https://www.fda.gov/media/134864/download>.

²⁵ *Ibid.*

²⁶ K. Thomas, How to Protect a Drug Patent? Give It to a Native American Tribe, *N.Y. Times*, Sept. 8, 2017, <https://www.nytimes.com/2017/09/08/health/allergan-patent-tribe.html>.

²⁷ *Saint Regis Mohawk Tribe v. Mylan Pharm. Inc.*, 896 F.3d 1322, 1327 (Fed. Cir. 2018) (finding that proceeding “is more like an agency enforcement action than a civil suit brought by a private party” and thus does “not implicat[e] (. . .) tribal immunity”).

²⁸ 21 U.S.C. § 355(j)(2)(A)(viii).

²⁹ *GlaxoSmithKline LLC v. Teva Pharm. USA, Inc.*, 976 F.3d 1347, 1373 (Fed. Cir. 2020).

³⁰ *Ibid.*, at 1358.

Such a “nullification”³¹ of the Hatch-Waxman Act “invites a claim of inducement for almost any generic that legally enters the market with a skinny label.”³² As shown by a lawsuit filed shortly after the decision, brand companies have wasted no time in doing this.³³

23. One thing is for certain. The FTC needs to be nimble in assessing all the ever-changing ways the pharmaceutical industry can delay generics.

V. Conclusion

24. The pharmaceutical industry often raises the argument that high drug prices are an inevitable result of innovation and that their conduct should avoid scrutiny because of the importance of drugs. But antitrust law allows us to have our cake and eat it too, ferreting out the “bad apples” while not harming innovation. The Biden administration can achieve these positive—in fact, life-altering—results by targeting conduct like pay-for-delay settlements, product hopping, biosimilar blockades, and the next frontier of anticompetitive conduct. ■

³¹ *Ibid.*, at 1359.

³² *Ibid.*, at 1366.

³³ See *Amarin Pharma, Inc. v. Hikma Pharma USA Inc.*, No. 20-cv-1630 (D. Del. filed Nov. 30, 2020).

The “ought” and “is likely” of Biden antitrust

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1. Antitrust has returned to the center ring of the multi-ringed political circus. Much concern has emerged with the economic and social power of the leading firms in the new technology—Apple, Google, Amazon, and Facebook. The recently filed Facebook litigation returns structural remedies (divestiture or dissolution) to the agenda of options for restoring workable competition. More prosaic concerns have reemerged with respect to many more traditional industries including meatpacking and pharmaceuticals. The bipartisan support for doing something about a range of competitive issues provides the basis for hope that the antitrust agenda of the Biden administration will be more robust than any in the last 40 years. Having been disappointed repeatedly by the failure of post-Reagan administrations to deliver effective antitrust enforcement, I find myself identifying the robust agenda that the new administration ought to pursue but worried that what we get is a warmed-over Obama agenda of good talk followed by very modest actions. Unfortunately, the changed judicial atmosphere makes a weak enforcement agenda even more likely. What follows is a brief description of the agenda that ought to be pursued and the contrasting agenda that is likely to emerge.

I. What ought to happen?

2. There ought to be a dramatic increase in enforcement of the law focused on restoring coherent and rational rules that protect both producers and consumers from the ravages of undue market concentration resulting in exploitive and exclusionary conduct. The resulting agenda should include a return to stricter merger enforcement. It is an increasingly well-documented fact that few, in any, major mergers have yielded significant efficiencies. At the same time, many of these mergers have resulted in price increases, inefficiency, and loss in innovation. Restoring stricter merger policy requires moving away from an excessive concern for identification of some specific likely adverse competitive effect. What the growing body of empirical work tells us is

that mergers among major competitors in even moderately concentrated markets are likely, one way or another, to result in competitive harms. The types of harm are myriad. Requiring enforcers to make specific predictions hamstring the enforcement process. A simple presumption based on *Philadelphia National Bank*¹ that mergers between major competitors are likely to cause adverse effects should suffice. The phrasing of the Clayton Act and the empirical evidence support a stricter standard even if it were to result in rejecting some mergers that might not harm competition significantly.

3. But too much concentration has already occurred to limit the Biden agenda to challenging only new combinations. Existing combinations have now disproven the optimistic assessments of earlier enforcers that they would have no adverse effect on competition. The more general point here is that antitrust enforcement should address existing abuses of market power and challenge the unjustifiably permissive stance of contemporary doctrine governing such areas as exclusive dealing as well as vertical territorial and customer restraints.

4. Moreover, the definition of what constitutes collusion in naked restraint cases ought to be revised. No “consumer welfare” gains come from “tacit” collusion among firms to raise prices and exclude competitors. Despite this obvious fact that ought to inform both public and private enforcement, the trend from *Baby Food*² to *Titanium Dioxide*³ has been to allow exploitation of both customers and suppliers. The Biden administration should take the lead in educating the courts that any remediable tacit collusion should be condemned.⁴

1 *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); see generally, P. C. Carstensen, *The Philadelphia National Bank Presumption: Merger Analysis in a Dynamic Economy*, 80 *Antitrust Law Journal* 219 (2015).

2 *In re Baby Food Antitrust Litigation*, 166 F.3d 112 (3d Cir. 1999) (rejecting conspiracy claim despite evidence of coordinated price increases).

3 *Valspar v. E.I. Du Pont de Nemours*, 873 F.3d 185 (3d Cir. 2017) (rejecting collusion claim despite history of uniform price increases).

4 See generally, P. C. Carstensen, *Commentary: Reflections on Hay, Clarke, and the Relationship of Economic Analysis and Policy to Rules of Antitrust Law*, 1983 *Wisc. Law Rev.* 953.

5. A group of private cases involving poultry, turkeys, and pork have highlighted the use of information exchange to achieve anticompetitive exploitation of markets—both upstream and downstream.⁵ These cases demonstrate the need for clearer and stricter standards to govern information exchange among competitors whether done directly as Philip Morris⁶ did or indirectly through a common agent as is the case in poultry, pork, and turkeys. The challenge is to identify the types of information necessary for informed market transactions and those which are likely to facilitate market exploitation. Certainly, the agencies should not be sitting on their hands with respect to these issues.

6. Demonstrating that various kinds of conduct are harmful to competition is not sufficient. There needs to be an effective remedy. One type of remedy is to impose constraints on how those firms conduct themselves. The frequent problem with this response is that it requires continued oversight by the agencies and courts. But these entities are not well designed to carry out these tasks, and the enterprises subject to such requirements have every incentive to evade the rules that control their exploitation and exclusion.

7. An alternative is to impose a structural remedy of the sort sought in the current Facebook complaints. But the application of such remedies can and should go beyond overt monopolies. The *DuPont-GM*⁷ case held that when a merger or acquisition results or is likely to result in adverse competitive effects, it can be challenged even if the acquisition occurred decades earlier and divestiture is an appropriate remedy. Hence, where a firm or group of firms have grown by merger into an oligopoly engaged in tacit collusion, this rule could be invoked to restructure the industry. Indeed, even if all growth were internal, there is no legal obstacle to requiring divestiture as a remedy where the industry structure has made collusion, both actual and tacit, easy.⁸ This is an ambitious agenda and would require a real commitment by the Biden administration to restoring workable competition to concentrated markets.

8. Then there are the monopolies in the new internet-based technology. Although the states and federal agencies have initiated litigation, the challenge is to find remedies that will actually affect market conduct and performance in useful ways. The history of settlements with Microsoft, Intel and Google does not suggest that this is an easy task especially if the enforcers restrict their demands to conduct-oriented controls. So, here again, a robust policy would seek to restructure these industries, as the Facebook complaint seeks. Remedy should focus on separating any inherently monopolistic elements from those that should be competitive. Eliminating the adverse effects from the monopolistic parts requires creative

thinking about remedy. Among the options would be interoperability or some collective ownership by users and customers of the monopoly elements.

9. There are also important legislative proposals pending that ought to be adopted with strong White House support. Given the hostility of the current judiciary to many antitrust claims, the most promising path to a more effective and robust enforcement policy is through new legislation that compels the courts to reject anti-competitive mergers, prohibits unjustified exploitative and exclusionary conduct, and deals effectively with the emerging monopolies in the high-tech domains. Notably, Senator Klobuchar has proposed legislation that would strengthen merger law by creating stricter standards for large mergers as well as revising and strengthening standards governing exclusionary conduct.⁹ Such legislation requires careful and thoughtful drafting to limit the wiggle room for judges hostile to its goals, but at the same time such legislation has to avoid imposing undue burdens on the competitive process. This is not an easy balance to achieve. Too often legislation, necessarily the product of compromise among contending views, has left too much for courts to fill in by interpretation of ambiguous clauses. For this reason, many committed to robust enforcement have shied away from legislative responses. There is, however, a significant need to reset antitrust law given the state of contemporary interpretations of the existing statutes. The Biden agenda should focus a great deal of attention on finding legislative responses that reinvigorate enforcement without creating avoidable loopholes and ambiguities that will undo the very objectives of the legislation.

10. Agencies beyond the FTC and Antitrust Division have a role to play in creating and maintaining fair, efficient, workably competitive markets. In the case of agriculture, there is clear need to revisit the regulations under the Packers and Stockyards Act (PSA) as livestock and poultry production has increasingly moved to the use of contracts which are often very one-sided and exploit producers.¹⁰ In energy, there is real need to revise regulations to facilitate better competition among electricity producers, which should include revisiting the current vertical integration of generation, transmission, and distribution. This would be a major undertaking but if there is to be reliance on market mechanisms to replace direct regulation, then the energy industry needs to be reframed to maximize the potential for desirable competition. Beyond energy and agriculture, there are many other domains where an informed emphasis on ensuring workable competition ought to be central to an administration that desires to have market processes serve the public interest.

5 See, e.g., *In re Broiler Chicken Antitrust Litigation*, 290 F. Supp. 3d 772 (N.D. Ill. 2017) (upholding the plausibility of the claimed conspiracy); *In re Pork Antitrust Litig.*, ___ F. Supp. 3d ___, 2020 WL 6149666 (D. Minn. 2020) (sustaining validity of complaint).

6 *Williamson Oil v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003).

7 *United States v. E.I. du Pont de Nemours*, 353 U.S. 586 (1957).

8 The leading example is *United States v. Paramount Pictures*, 334 U.S. 131 (1948).

9 See, S.307 - Consolidation Prevention and Competition Promotion Act of 2019, available at <https://www.congress.gov/bill/116th-congress/senate-bill/307/text> (revising merger standards to establish stronger enforcement standards); see also S.3426 - Anticompetitive Exclusionary Conduct Prevention Act of 2020, available at <https://www.congress.gov/bill/116th-congress/senate-bill/3426/text> (imposing stricter standards to deter exclusionary conduct).

10 7 USC §§ 181 et seq. (forbidding unfair or discriminatory conduct by livestock and poultry handlers in the treatment of producers).

II. What is likely to happen?

11. First, the courts are a major stumbling block to enhanced enforcement even if the agencies were willing to be more aggressive. The ill-conceived *American Express*¹¹ decision highlights the willingness of the Supreme Court to twist economic analysis into an intellectual pretzel that serves only to defeat legitimate challenges. The failure of the courts to appreciate the relevance of potential competition to preserving and enhancing long-run viable market behavior is another recent example.¹² The failure to recognize the competitive problems created by the vertical consolidation of AT&T with Time Warner which created significant risks of both exploitation of consumers and exclusion of competitors provides yet another example of the obstacles to achieving a more robust enforcement policy.¹³ Thus, the contemporary judicial temper is one of great reverence for large enterprise and deep concern not to inhibit its freedom of action. Until there is a significant change in judicial personnel, or the current judiciary goes through a major re-education, a robust enforcement agenda is likely to die in the courthouse.

12. But given a hostile judiciary, the agencies are likely to limit their challenges to the most obvious cases. Important cases will die on the courthouse steps without ever getting into court. To be sure, the agencies are less likely to waste time investigating minor marijuana mergers and to focus resources on more important matters. The emergent judicial demands for detailed proof of actual adverse competitive effects will limit the scope of what can be done. The resources to develop a major case in light of these expectations will be significant and so constrain the agencies further. Thus, while merger enforcement may see an uptick especially where the merger involves two major direct competitors in more than moderately concentrated markets, the incentives to pursue vertical or potential competition cases will be very limited. Similarly, despite the growing recognition of how dominant firms, especially in the high-tech arena, buy up nascent competitors, the current standards for merger analysis will make such challenges very unlikely.

13. Given the *American Express* decision, the burden of challenging anticompetitive vertical restraints is likely to deter the enforcers from following up on the *Dentsply*¹⁴ and *McWane*¹⁵ cases except, where, as in those cases, a clear monopoly existed. Given existing market concentrations in many industries, this will result in the continuation of a plethora of harmful restraints.

14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration's abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities.

15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate!

16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape. ■

¹¹ *Ohio v. American Express*, 585 U.S. ___, 138 S.Ct. 2274 (2018).

¹² *FTC v. Steris*, 133 F. Supp. 3d 962 (2015) (rejecting challenge to combination of potential entrant and dominant firm in concentrated market).

¹³ *United States v. AT&T*, 916 F.3d. 1029 (D.C. Cir. 2019) (allowing AT&T to acquire Time Warner).

¹⁴ *Dentsply Intern. v. United States*, 399 F.3d. 181 (3d Cir. 2005).

¹⁵ *McWane v. FTC*, 783 F.3d 814 (10th Cir. 2015).

The next four years: antitrust enforcement on an upward trajectory

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1. Despite the tumult of 2020—the pandemic, racial tensions, and a divisive presidential election—antitrust remains a central focus in the United States. But while some Democratic presidential candidates, such as Elizabeth Warren and Amy Klobuchar, made antitrust a major element of their platforms, the Biden campaign was relatively low-key on the subject. So, looking into the crystal ball, what can we expect from the Biden administration in the antitrust arena? Certainly, the administration is being encouraged to take a revitalized approach to competition policy and enforcement, and to devote resources to the passage of new legislation, agency appropriations, appointing leadership focused on deterrence, and adopting a “whole government” approach.¹ But will the administration heed these calls to action, or adopt a more middle-of-the-road and incremental approach to change?

I. Agency leadership

2. First of all, do not expect immediate and dramatic changes in the approach of the antitrust agencies on January 20, 2021. Change starts at the top, and the process for installing new Biden-appointed leadership in the antitrust agencies could take time. Following Biden's inauguration there will likely be a delay during which candidates for key antitrust leadership posts—the assistant attorney general for the Antitrust Division and any new commissioner of the Federal Trade Commission—are identified, nominated and confirmed by the Senate.

3. These delays can be extensive: in the first year of the Trump administration, it took over nine months to confirm the current Assistant Attorney General for Antitrust, Makan Delrahim. AAG Delrahim has indicated his intention to resign at the end of 2020, which will leave the leadership of the Antitrust Division in the hands of one of the existing (Republican-appointed) deputies. While the administration can make appointments to posts that do not require Senate confirmation (such as Deputy Assistant Attorneys General), that has not been the traditional approach. During the transition period, business usually continues as before the election, with little turnover at the staff level and the front office maintaining the status quo.

4. Over at the FTC, the transition also will proceed at a measured pace. Even if the current Chairman, Joe Simons, resigns (as is the practice), the Commission will be left with two Democratic commissioners and two Republicans until a new commissioner can be appointed. And while we are unlikely to end up in the odd situation that occurred early in the Trump administration when there were only two sitting commissioners, the prospect of a 2-2 deadlock over whether to bring enforcement action is a real one for any case that pushes the boundaries of the prevailing approach—and based on the positions of the two Democratic commissioners over the last few years, there could be several opportunities for this to play out.

5. Given the current national focus on antitrust, it is likely that the Biden administration will try to move quickly—and certainly faster than the Trump administration did—to appoint to key antitrust leadership posts. The announcement of nominees for key posts such as Attorney General and other top Department of Justice posts even prior to the January 20 inauguration augur's swifter action. Even so, it is probable that Biden will nominate fairly centrist candidates to the DOJ and FTC posts, given his more moderate positions throughout the campaign.

¹ *Restoring Competition in the United States*, Transition Report of the Washington Center for Equitable Growth, November 19, 2020, available at <https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states>. The report was authored by Bill Baer (who currently serves on the Biden transition team), former Antitrust Division Deputy Assistant Attorneys General Jonathan Baker, Fiona Scott Morton, Carl Shapiro, and Nancy Rose, former Antitrust Counsel for Senator Amy Klobuchar Michael Kades, and academic Tim Wu.

II. Agency enforcement

6. Given the possible pace of leadership change, as well as the continuing service and commitment of agency career staff, we are unlikely to see a dramatic change in the agencies' approach to enforcement in the near term. But, despite claims to the contrary, that approach has not been lax over the Trump years. Contrary to the stereotype that the agencies are more pro-business and less interventionist under Republican leadership, both agencies have been very active in bringing cases, several the culmination of active investigations that were ongoing throughout the Trump years. In 2020 alone, in addition to several merger consent decrees, the FTC has brought a record-breaking 11 cases, more than double the number filed in each of the prior three years, and bringing the agency's total over the last four years to 22 versus 12 cases brought in the four years of the Obama administration.² While such enforcement activity is to some extent a function of the matters that come before the agency, it does indicate a strong institutional commitment to investing resources in investigating and aggressively pursuing cases.

7. At both agencies, it is likely that there will be an increased focus on consummated mergers—with the potential for post-consummation challenges seeking to unwind deals. The July 2020 Biden-Sanders Unity Task Force Recommendations called for a review of all merger clearances from the Trump years to “*assess those that have created highly concentrated markets, demonstrably caused harm to workers, raised prices, exacerbated racial inequality or reduced competition*” and to “[t]ake steps to hold these companies accountable and derive policies to repair the damage done to working people and to reverse the impact on racial inequity.”³ Consistent with the increased work that such a project would entail as well as a general commitment to heightened antitrust enforcement, members of Biden's transition team have called on the administration to significantly expand funding for the antitrust agencies.

8. The healthcare and pharmaceutical industries stand out for greater focus. The Unity Platform vowed to “*vigorously use antitrust laws to fight against mega-mergers in the hospital, insurance, and pharmaceutical industries that would raise prices for patients by undermining market competition.*”⁴ Through the Trump years, the FTC has been a very active enforcer in hospital mergers and DOJ has pursued antitrust enforcement actions in several healthcare markets as well as closely reviewing numerous health insurer mergers. Enforcement may be heightened going forward, perhaps less as a result of a policy shift and more from increased activity.

2 Hat tip to Kevin Hahn for his FTC case count on LinkedIn (December 8, 2020).

3 Biden-Sanders Unity Task Force Recommendations, July 2020, at 74, available at <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf> (the “Unity Platform”).

4 Ibid. at 33, 90.

Post-pandemic pressures on the healthcare system, which have raised concerns about the supply chain for key hospital equipment, as well as putting providers under strain from disrupted operations, will lead to an even closer focus on the industry. The industry expects to see greater merger activity, as well as non-merger collaborations, between healthcare providers and companies at all levels of the healthcare delivery system, which will likely to attract close reviews, and potentially greater risks of challenge. In relation to conduct cases, the DOJ has signaled that it will take a strong position against anticompetitive conduct in healthcare markets, as evidenced in its criminal prosecution of the operators of oncology centers in Florida for market-allocation agreements.⁵ The Trump-era activity of the current Democratic FTC Commissioners—Rohit Chopra and Rebecca Slaughter—suggest that more aggressive antitrust enforcement in the pharmaceutical industry is on the cards. Commissioners Chopra and Slaughter have issued several dissenting opinions relating to proposed FTC merger consent decrees, notably in pharmaceutical company mergers, where they believe that the prevailing FTC approach of analyzing markets by individual products and permitting mergers to go ahead with narrow divestitures is “*myopic and misses (. . .) the fundamental elements of how firms compete in this industry.*”⁶ They would have the FTC look more broadly at overall concentration levels in the pharmaceutical industry, and the potential for coordinated conduct and collusion. This is consistent with general positions in the Biden platform that the FTC use antitrust authority to challenge mergers that lessen generic competition.⁷

10. Commissioners Chopra and Slaughter also have advocated for more aggressive use of the FTC's powers under Section 5 of the FTC Act (prohibiting “*unfair methods of competition*”) to address “unreasonable” price increases for off-patent pharmaceutical drugs and biologics, rejecting concerns with the dangers of interfering with market pricing mechanisms.⁸ And, under a Democrat-led FTC, we may see broader application of Section 5 beyond the pharmaceutical context. Commissioner Chopra and other academic commentators have called for the FTC to utilize its administrative rulemaking authority to develop overarching standards for what is an “*unfair method of competition*” and make it easier for the agency to take enforcement actions against a broader array of practices than it does today. And, depending on the outcome of an upcoming Supreme Court decision on the FTC's

5 “Leading Cancer Treatment Center Admits to Antitrust Crime and Agrees to Pay \$100 Million Criminal Penalty,” DOJ Press Release, April 30, 2020, available at <https://www.justice.gov/opa/pr/leading-cancer-treatment-center-admits-antitrust-crime-and-agrees-pay-100-million-criminal>.

6 Statement of Commissioner Rohit Chopra, joined by Commissioner Rebecca Kelly Slaughter, *In the Matter of Pfizer Inc. / Mylan N.V.*, October 30, 2020, available at https://www.ftc.gov/system/files/documents/public_statements/1582382/191_0182_pfizer-mylan_-_dissenting_statement_of_comms_chopra_and_slaughter_1.pdf.

7 Unity Platform, at 94.

8 Statement of Commissioners Rohit Chopra and Rebecca Kelly Slaughter, Federal Trade Commission Report on the Use of Section 5 to Address Off-Patent Pharmaceutical Price Spikes, June 24, 2019.

authority to obtain monetary equitable relief under Section 13(b) of the FTC Act, we may see the Democrats propose new legislation to codify or strengthen the FTC’s authority to seek financial relief against companies accused of anticompetitive conduct.⁹

11. Another area in which Commissioners Chopra and Slaughter have foreshadowed a different approach is vertical mergers. When the FTC and DOJ issued new joint vertical merger guidelines in June 2020,¹⁰ Commissioners Chopra and Slaughter each dissented, raising concerns that the guidelines overemphasized the benefits of vertical transactions and did not adequately address various theories of harm or remedies. Since the election, in December 2020, the Commissioners issued a brief statement cautioning against “*relying on the [guidelines] as an indication of how the FTC will act upon past, present, and future transactions,*” noting that they “*look forward to turning the page on the era of lax oversight and to beginning to investigate, analyze, and enforce the antitrust laws against vertical mergers with vigor.*”¹¹

12. One area the Biden Unity Platform expressly identified for antitrust attention is labor markets, calling out non-compete clauses and “no-poaching” agreements (agreements not to solicit each other’s employees).¹² Again, this would continue the agencies’ existing commitment to maintaining competition in labor markets demonstrated by the joint 2016 Antitrust Guidance for Human Resource Professionals, and ongoing “no-poach” enforcement activity through the Trump administration. Following the 2016 guidance, the DOJ had intimated that several criminal cases were in the works, but it took several years for the right candidate to emerge. In fact, the DOJ very recently issued its first criminal indictment in a no-poach case—against the former owner of a North Texas physical therapist staffing company for conspiring with competitors to suppress wages for physical therapists,¹³ and in January 2021 brought a second action against the operators of outpatient medical facilities for an alleged agreement not to solicit each other’s senior executives.¹⁴ Historically criminal antitrust enforcement activity - such as against price-fixing cartels - has remained fairly consistent as administrations change, and we can expect to see ongoing investigations and criminal enforcement in this area, particularly in the healthcare space, which has long been a focus of civil enforcement for anticompetitive labor practices.

9 AMG Capital Management, LLC v. Federal Trade Commission, Supreme Court Docket No. 19-508, on appeal from the 9th Circuit.

10 U.S. Department of Justice and the Federal Trade Commission Vertical Merger Guidelines, June 30, 2020, available at <https://www.justice.gov/atr/page/file/1290686/download>.

11 Joint Dissenting Statement of Commissioners Rohit Chopra and Rebecca Kelly Slaughter Regarding the Vertical Merger Commentary, December 22, 2020, available at https://www.ftc.gov/system/files/documents/public_statements/1585062/p181201chopraslaughtervmcdissent.pdf.

12 <https://joebiden.com/empowerworkers>.

13 Former Owner of Health Care Staffing Company Indicted for Wage Fixing, DOJ Press Release, December 10, 2020, available at <https://www.justice.gov/opa/pr/former-owner-health-care-staffing-company-indicted-wage-fixing>.

14 U.S. v. Surgical Care Affiliates, Case No. 3:21-cr-00011-L, N.D.Tex., Indictment, January 5, 2021.

III. Legislative change

13. There has been ongoing debate in the U.S. around the purpose and goals of antitrust policy in the light of what some perceive as burgeoning concentration in industries key to our economy—airlines, agriculture, healthcare and pharmaceuticals, technology, and many others. Does the “consumer welfare” standard, with its modern focus on the value that scale and efficiency can bring to consumers, truly reflect the vision of the Sherman Act? Or have years of judicial interpretation of the Sherman Act’s admittedly terse prohibitions landed us in the wrong place, where broader interests such as fairness in labor markets are neglected? The Unity Platform suggests that Biden may fall in the latter camp,¹⁵ although his resumé as a lawmaker who prided himself on brokering bipartisan consensus on major issues suggests that the Biden administration will take a more middle-road approach.

14. Even during the Trump administration these questions were hotly debated and the bipartisan concerns about concentration were reflected in Senate hearings and reports (from both sides of the aisle), as well as ongoing agency investigations, principally focused on the tech space. During the Biden administration, there is likely to be a wide range of legislative proposals to strengthen the antitrust laws. The report of the Democrat-led Senate Antitrust Subcommittee on its investigation of competition in digital markets¹⁶ included proposals for a far-reaching overhaul of the antitrust laws; however, such bold proposals may be limited by the Democrats’ very narrow majority in the Senate. Several Democratic lawmakers have separately introduced legislation aimed at strengthening antitrust enforcement in specific ways. For example, Senator Klobuchar’s latest proposal, the Anticompetitive Exclusionary Conduct Prevention Act,¹⁷ seeks to ease antitrust enforcement in concentrated industries by shifting the burden of proof to “*powerful companies that have a market share of greater than 50% or that otherwise have substantial market power,*” requiring them to prove that allegedly exclusionary conduct would not present an “*appreciable risk of harming competition.*”¹⁸ More incremental approaches along these lines may find more middle ground with Senate Republicans.

15 Unity Platform, at 67, proposing to “Charge antitrust regulators with systematically incorporating broader criteria into their analytical considerations, including in particular the impact of corporate consolidation on the labor market, underserved communities, and racial equity.”

16 Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, October 2020, available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

17 S.3426, 116th Cong. § 4(a) (as reported by S. Comm. on the Judiciary, Mar. 10, 2020), available at <https://www.congress.gov/bills/116th-congress/senate-bill/3426/text>.

18 Klobuchar Introduces Legislation to Deter Anticompetitive Abuses, [klobuchar.senate.gov](https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=E59886E1-12EE-48A5-94F5-044658A75513), March 10, 2020, available at <https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=E59886E1-12EE-48A5-94F5-044658A75513>.

IV. Conclusion

15. While the Biden campaign policies on antitrust contain references to a strong commitment to vigorous antitrust enforcement in key sectors of the economy, it is not clear how much of a shake-up will actually take place as agency leadership transitions. The Trump administration got off to a slow start on antitrust, but both federal agencies are now very active in merger enforcement, as well as conduct and monopolization cases, and this level of activity is likely to continue into the new year and beyond. What remains to be seen is the extent to which new leadership will push the boundaries of the current approach, and if the new administration will invest additional resources to allow the agencies to expand their enforcement agenda.

16. Significant shifts can most readily be predicted at the FTC, where the views and positions of the existing Democratic commissioners have already been broadcast through their speeches and dissenting statements. With Democratic commissioners in the majority, we can expect the agency to be more aggressive in merger and conduct enforcement across the board. And we may see attempts to change the antitrust enforcement playing field with regulatory initiatives, which will no doubt be controversial and hotly contested, and potentially new antitrust legislation. In any event, antitrust enforcement in the Biden administration will be assertive and enthusiastic. ■

Biden antitrust: The middle way*

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1. Shortly after the inauguration of Donald J. Trump as president in 2017, we wrote an article entitled “America-First Antitrust.” In the article we speculated on what the signature theme of Donald Trump’s campaign might mean for antitrust enforcement in the coming administration.¹ We feared that “America First” might lead to nationalistic antitrust in which non-US interests would be a target of active discrimination. In part we were good prognosticators; in part not. The Trump administration followed nationalistic economic policies in trade, foreign investment in the United States, and intellectual property—but not in antitrust.

2. The incoming Biden administration does not offer a similar signature theme. The Democratic Party Platform did not place antitrust front and center, although it did devote a paragraph to “tackling runaway corporate concentration.”² Instead, we have signals from the Biden team that Biden wants tougher antitrust and that he wants to control big tech, and also numerous statements from Biden that he wants to govern by consensus. We also have a variety of proposals, ranging from increased funding of the antitrust agencies and more aggressive enforcement using existing tools to bold interventions such as presented in the Majority Staff Report of the House of Representatives’ Antitrust Subcommittee and in legislation introduced in the 116th and previous Congresses.

3. In this essay we attempt to distill an antitrust agenda meet for the time. We start with a tension. We think that dramatic change is needed in US antitrust, but we see critical roadblocks to that agenda for the near future. US antitrust doctrine and courts have turned decidedly conservative. Aggressive enforcement actions, of the type recently filed against Google and Facebook, may not face receptive judicial audiences. Congress is at best clo-

sely divided, at worst hostile. Nevertheless, although an antitrust agenda must, in the short run, work with the tools currently available, we think that significant change is both desirable and achievable. This is our middle way.

4. We divide our agenda into four R’s for the Biden administration: restore integrity, rejoin the world, reinvigorate enforcement, and rethink key approaches. The first three R’s focus on the immediate; they are goals for the first year of Biden antitrust. The fourth—rethinking key approaches—is critical for making more fundamental changes in antitrust.

I. Restore integrity

5. The Department of Justice has been one of the major casualties of the Trump administration. The antitrust community hoped that antitrust enforcement would not be affected by the political weaponization of law enforcement, but that has not been the case. To the contrary, the Department’s overall conduct has created suspicion that antitrust enforcement has been in service of political vendettas rather than political values. These suspicions were confirmed by congressional testimony from a whistleblower, John Elias, a former acting chief of staff to the head of the Antitrust Division, who provided specific examples of political interference. That testimony was never credibly rebutted.³

6. The weaponization of antitrust has cast a pall of illegitimacy over earlier Trump administration cases (the *AT&T/Time Warner* merger, for example) and recent ones (the *Google* monopolization case). We expect the Biden Justice Department not to fall prey to weaponized law enforcement.

7. Politicization of antitrust in the past has usually involved decisions not to sue political friends rather than to sue political enemies. Partisan pressures could resurface

* An earlier version of this article was published in *Antitrust Report*, Release No. 1/21, under the title “Four R’s for Biden Antitrust: Restore, Rejoin, Reinvigorate, Rethink.” We thank the *Antitrust Report* for permission to use substantial parts of that article in this version.

1 See E. M. Fox & H. First, *America-First Antitrust*, *CPI Antitrust Chronicle*, Feb. 2017.

2 See 2020 Democratic Party Platform at 25 (Aug. 18, 2020), <https://democrats.org/wp-content/uploads/sites/2/2020/08/2020-Democratic-Party-Platform.pdf>.

3 See <https://www.justsecurity.org/71059/top-antitrust-lawyers-assess-john-elias-whistleblower-complaint-against-a-g-barr-including-office-of-professional-responsibility-letter/> (June 26, 2020) (views of eleven top antitrust experts).

if the Biden administration chooses a forceful enforcement agenda, for example, plans to enjoin big mergers, or to stop restrictive licensing of intellectual property, or to call Big Tech platforms to account by FTC antitrust rulemaking. There are measures the agencies can take to make the legal community more confident that agency action is driven by rule of law, not rule of friends and enemies. Litigating cases rather than settling them can help steer cases along the path of transparently reasoned judicial outcomes. The enforcers' judicious use of closing statements can help revive nonpolitical antitrust as well. But the main tool to restore confidence in the integrity of the system will be for the agencies to follow antitrust's North Star—to foster competition through markets.

II. Rejoin the world

8. The United States has been AWOL from the antitrust world. Once the leader, it has donned a see-no-power mantle. US antitrust has lost resonance in the world. The European Union has taken up the slack. It has asserted leadership, launching, for example, international conversations on how to control the power of Big Tech. The US should come to the table. Competition rules for Big Tech platforms are under the consideration of Europe's Directorate-General for Competition (and other agencies as well). Europe's Competition Commissioner Vestager has invited the US to help formulate an "EU-US 'common vision' on platform competition policy,"⁴ a view subsequently formalized in an announcement that that "the EU will propose a new transatlantic dialogue on the responsibility of online platforms, which would set the blueprint for other democracies facing the same challenges."⁵

9. We should accept the invitation and join the conversation. Also, the US should step out front as a leader. There is open space to claim beyond digital markets. Antitrust law has not yet risen to the dual challenges of controlling companies bigger than nations and of eliminating unwieldy overlapping regulation. For example, here are two opportunities for work that needs to be done on merger control.

1. Pre-merger process

10. The present balkanized system of pre-merger notification is ostensibly wasteful. The same multi-jurisdictional merger must be filed in scores of jurisdictions around the world. Staffs of resource-stretched agencies (and less stressed ones) devote hundreds of hours per merger to getting and analyzing documents and predicting economic effects, even though the effects are likely to be substantially the same in a number of the jurisdictions, most of the documents needed for analysis are identical, and 95% of mergers filed have no anticompetitive effects.

4 Euractiv, July 30, 2020, <https://www.euractiv.com/section/digital/news/vestager-calls-for-eu-us-common-vision-on-platform-competition-policy>.

Vested interests (including lawyers), nationalistic interests, and simple lack of vision keep us from breaking out of this dysfunctional system.

11. We need a common clearing house for first filings, which give enough information for jurisdictions to request a tailored second filing when indicated. This suggestion was made in both the ICPAC Report⁶ and the Antitrust Modernization Commission Report⁷ but no action has been taken. The US antitrust agencies should develop the concept and take it to the International Competition Network for further refinement and consensus building.

2. Enjoining multi-jurisdictional megamergers likely to have widespread anticompetitive effects

12. We witness multi-jurisdictional megamergers with severe anticompetitive effects worldwide that were unthinkable a decade or two ago. Lafarge/Holcim is a good example; it combined the two largest cement companies in the world. Cement is the industry that ranks first in the world for cartels, and probably first for procuring anti-dumping action whenever cheaper foreign product threatens the incumbents' turf. The merger was cleared in every jurisdiction, with spin-offs thought to protect the regulating nation's citizens.

13. Some megamergers are ostensibly anticompetitive and bad for the world. In an earlier day, they would have been enjoined. In the 21st century, the leading agencies—US and EU—have swallowed the argument that even the biggest mergers should be blessed, with spin-offs to protect their own jurisdictions. Nobody is minding competition in the world, and yet we all would be better off if the global commons of competition were protected. If the world's competition agencies could have lifted their blinders to view competition in the world, and if they had accepted a role to protect those harmed by their mergers, the major jurisdictions would probably have enjoined the Lafarge/Holcim merger, protecting world competition, themselves, and the multitude of developing countries that were especially threatened but had no practical power to enjoin.⁸

6 Report of the International Competition Policy Advisory Committee to the Attorney General and the Assistant Attorney General (2000), <https://www.justice.gov/atr/final-report>. See separate statement of Commissioner Eleanor Fox, App. 1A. Also, the Report proposes seamless teamwork for multi-jurisdictional merger analysis. It envisions a coordinating jurisdiction, which would evaluate all pro- and anticompetitive effects wherever they fall in the world (pp. 76–80).

7 Report of the Antitrust Modernization Commission, <https://govinfo.library.unt.edu/amc>. The Commission called on the DOJ and FTC to consult with other jurisdictions and consider the possibility of one simple filing. "The Commission believes that further steps toward a common system would be valuable and should be feasible. The antitrust agencies should report to Congress promptly as to whether a more uniform and less burdensome notification system is feasible." (p. 217).

8 See E. Fox & M. Bakhom, *Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa* 136–39, 156 (Oxford University Press, 2019).

14. The US competition agencies should take leadership in establishing channels and fora for multi-jurisdiction collaborations that would give courage of convictions to enjoin mergers that harm world competition. The fora should be available to discuss and collaborate on merger relief in general, so that relief is coordinated and consistent rather than ad hoc and over-regulatory. As with a system of common merger filings, this proposal should be developed and brought to the ICN.

15. The role for the US as antitrust leader in the world is waiting.

III. Reinvigorate antitrust

16. Recently filed suits—three against Google (one by the Justice Department and 11 states, and two by different groups of states) and three against Facebook (one by the Federal Trade Commission and two by different groups of states) indicate that government enforcers are finally heeding a virtually unprecedented public call for antitrust enforcement against the Big Tech platforms. These cases are a good start on a reinvigorated enforcement effort, but they are just that, a start.

17. We focus here on four items for reinvigorating antitrust enforcement: legislation, exercising the FTC’s powers, intellectual property, and cartels. This is an agenda aimed at the first year; it is not meant to be an exhaustive list.

1. Legislative agenda

18. Antitrust law in the United States has relied on common law development rather than legislative change. The last major substantive change came in 1950, with the Celler–Kefauver amendments to Section 7 of the Clayton Act. Subsequent legislative change has stuck to process, although some of that legislation has been quite consequential.

19. Democrats introduced four major antitrust proposals in the 116th Congress (just concluded). One would have made it easier to stop very large mergers by changing the liability standard and shifting to the merging parties the burden of showing that the effect of the merger will not likely materially lessen competition.⁹ A second would have increased appropriations for the Antitrust Division and the FTC.¹⁰ A third would have broadened the concept of exclusionary conduct from current US court interpretations and shifted the burden of justification for conduct by firms with more than 50% of the market (rather than

⁹ See Consolidation Prevention and Competition Promotion Act of 2019, S.307, 116th Cong., 1st Sess. (2019).

¹⁰ See Merger Enforcement Improvement Act, S.306, 116th Cong., 1st Sess. (2019).

the more common threshold of two thirds).¹¹ A fourth would have given the Justice Department and the FTC the authority to seek civil penalties for violations of Section 2 of the Sherman Act (acts of monopolization).¹²

20. This is a worthwhile legislative agenda. Even so, these bills do not strike at the structure of the major platforms—which Senator Elizabeth Warren and others urged for Amazon, Google, and Facebook. They do not propose functional separation of “gatekeeper” platforms and businesses transacted on platforms, as Senator Warren and the Staff of the Majority House Subcommittee proposed.

21. Even without structural proposals, however, the legislative package was not adopted in the 116th Congress and it is not likely that the new 117th Congress will be any more amenable to its passage, at least in the first session. Still, two of these bills would be a worthy and achievable start for a Biden administration that seeks to dismantle the roadblocks to rejuvenating antitrust: permit civil penalties for monopolization offenses and increase the resources available to the Antitrust Division and the FTC.¹³ The just-filed *Google* and *Facebook* cases show the need for both—neither complaint includes a request for monetary penalties, and both cases will likely strain enforcement resources.

2. FTC rulemaking, Section 5 of the Federal Trade Commission Act, and Big Tech platforms

22. If revolutionary antitrust legislation seems unlikely in the near future, how can a Biden administration meet the challenge of Big Tech platforms while there is still time to do so? Litigation is the route now being pursued, but litigation will be slow (pretrial motions in the DOJ’s *Google* case are now scheduled through August 2023) and conservative judicial precedent makes success difficult to achieve.¹⁴

23. The solution is for the FTC to engage in antitrust rulemaking, setting out rules that would proscribe specific anticompetitive conduct when engaged in by a set of lea-

¹¹ See Anticompetitive Exclusionary Conduct Prevention Act of 2020, S.3426, 116th Cong., 2d Sess. (2020).

¹² See Monopolization Deterrence Act of 2019, S.2237, 116th Cong., 1st Sess. (2019).

¹³ See N. L. Rose, Will Competition Be Another COVID-19 Casualty? at 6 (July 2020) (between 2010 and 2018 merger filings increased 80% but real antitrust appropriations have fallen 47%), https://www.hamiltonproject.org/assets/files/Rose_LO_FINAL.pdf; H. First, The Case for Antitrust Civil Penalties, 76 *Antitrust L.J.* 127 (2009) (criticizing lack of antitrust civil penalties).

¹⁴ See, e.g., E. M. Fox & H. First, Big Tech and Antitrust – Calling Big Tech to Account Under U.S. Law 7–9 (August 2020), <https://ssrn.com/abstract=3672750>; J. B. Baker et al., Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets 7–9 (April 30, 2020), <https://ssrn.com/abstract=3632532>.

ding platforms.¹⁵ As we have written: “We now have lists of conduct that appear on its face to be offensive and inefficient. After appropriate hearings, rules can specify the targeted conduct and, where consumer benefits might possibly be claimed, shift the burden to the platforms to prove this case.”¹⁶ This approach could draw on similar efforts being pursued in other jurisdictions such as the European Union, the UK, and China.¹⁷ Indeed, as we noted above, this rule-making effort would be part of a more general policy to rejoin the world and approach global competition problems globally.

24. It is also time for the FTC to use the full authority that Congress gave it in 1914 under Section 5 of the FTC Act to reprimand “unfair methods of competition.” Every so often the Commission pokes its head up to assert a Section 5 argument that goes beyond the confines of the Sherman Act, but the Commission never seems to press the matter. A prime example is its decision not to pursue its Section 5 claim in the failed *Qualcomm* litigation.¹⁸

25. In view of the Supreme Court’s continual shrinking of the reach of Section 2 of the Sherman Act, policy-makers and interested stakeholders have called upon the FTC to restate the scope of a potentially much broader Section 5. The Commission last issued a statement of its Section 5 authority in 2015. That statement took a narrow view of the ways that Section 5 might be interpreted that would go beyond the limits of current Sherman Act interpretations.¹⁹ The FTC should revise the statement and commit itself to a more robust view of what conduct is anticompetitive. It can use its Section 5 authority to pursue a much wider range of exclusionary and exploitative conduct, which could include an effort to deal with excessive pricing of pharmaceutical drugs.²⁰

3. Intellectual property

26. The Justice Department has historically been concerned about IP holders’ broad assertions of their rights. The Department generally sought to limit the rents that holders of “statutory monopolies” could extract from downstream licensees or consumers and viewed marketplace competition, not monopoly, as the real driver of innovation.

27. In the Trump administration, however, Makan Delrahim, the head of the Antitrust Division, gave a series of speeches that reversed prior Justice Department policy. Delrahim urged “dogged perseverance in favor of strong patent protections” and argued that “antitrust law should not police FRAND commitments” (fair, reasonable, and non-discriminatory licensing terms) to which the holders of standard-essential patents (SEPs) agreed in return for being part of the standard.²¹ Meanwhile, the FTC won a case against Qualcomm for using its FRAND-committed SEPs to exclude other chip makers and maintain its monopoly prices by anticompetitive licensing and bundling. Qualcomm appealed to the Ninth Circuit. The Division denounced the FTC victory and filed an amicus brief on Qualcomm’s side. The Ninth Circuit reversed the FTC victory.²²

28. The Biden administration Antitrust Division needs to reverse the Trump administration’s policy change and partner with the FTC in its effort to put appropriate limits on IP rights holders. If anything, as we move to an ever-more-connected Internet of Things, our economy will become more dependent on technology that is protected by intellectual property rights. Implementers of that technology need to be able to get access to those innovations on terms that reflect their economic value, rather than on terms of monopoly illegitimately claimed by SEP holders by virtue of their patents having been incorporated into the standard.

4. Cartel enforcement

29. The Antitrust Division has pursued a policy of vigorous criminal enforcement against cartels—primarily international cartels—for more than two decades. Many consider this effort to be one of the major accomplishments of US and global competition law enforcement.

30. Recent enforcement data, however, show a marked dip in the Division’s criminal cartel cases. Although the number of criminal cases filed in 2019 was up a bit over 2018 and 2017, the number was still less than half the number filed in 2015 and lower than in any year in this

15 See E. M. Fox & H. First, We Need Rules to Rein in Big Tech, *CPI Antitrust Chronicle* (Oct. 2020), <https://ssrn.com/abstract=3724595>.

16 *Ibid.* at 4.

17 See *supra* note 4 and accompanying text; Government Response to the CMA’s market study into online platforms and digital advertising (Nov. 2020) (UK government agrees to establish a “Digital Markets Unit” in the CMA to write code of conduct for firms with “strategic market status,” such as Google and Facebook, with power to impose fines for violations), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939008/government-response-to-cma-study.pdf; State Administration for Market Regulation, 关于平台经济领域的反垄断指南 (征求意见稿) (Antitrust Guidelines in the Field of Platform Economy [Draft for comments]), http://www.samr.gov.cn/hd/zjdc/202011/t20201109_323234.html.

18 The FTC included it in its complaint but allowed the claim to lapse in the district court. See *FTC v. Qualcomm, Inc.*, 969 F.3d 974, 986 n. 11 (9th Cir. 2020).

19 See Federal Trade Comm’n, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the Federal Trade Commission Act, 80 Fed. Reg. 57056 (Sept. 21, 2015).

20 See H. First, Unfair Drug Prices and Section 5, *CPI Antitrust Chronicle* (Nov. 2015), <https://ssrn.com/abstract=2699843>.

21 M. Delrahim, Ass’t Attorney Gen’l, Antitrust Div., Dep’t of Justice, The “New Madison” Approach to Antitrust and Intellectual Property Law at 4 (March 16, 2018), <https://www.justice.gov/opa/speech/file/1044316/download>; Delrahim, Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law at 7 (Nov. 10, 2017), <https://www.justice.gov/opa/speech/file/1010746/download>. Delrahim’s speeches are closely critiqued in M. A. Carrier, Why Property Law Does Not Support the Antitrust Abandonment of Standards, 57 *Hous. L. Rev.* 265 (2019).

22 *FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020).

century. In fact, you have to go back to the 1970s—when violations were still misdemeanors!—to find numbers that are at the same level as we see today.²³

31. It is hard to explain this change in enforcement patterns, a change that is mirrored in lower average incarceration rates and reduced corporate fines. Perhaps deterrence is suddenly working; perhaps the leniency policy has reduced the incentives for government prosecutors to proactively investigate cases or is now disincentivizing cooperation; perhaps the cost/benefit calculation of seeking leniency has shifted with increased risks of private damages; or perhaps it is something else. In any event, it will not do for the Biden administration to continue the status quo. A full review of the criminal cartel enforcement program is a necessary first step to revitalizing criminal antitrust enforcement. Indeed, it is a step that is in keeping with the first “R” we set out, restoring integrity.

32. Criminal cartel enforcement is not just about large-scale international cartels. More localized cartel activity, often involving bidding on public contracts, was the focus of the Division in the 1980s and has now returned as a new “Public Procurement Task Force,” announced in 2019. Much of the Task Force’s effort so far seems to have gone into getting teams of federal, state, and local prosecutors together, “building relationships and getting the word out,” although the Division does claim that the Task Force has opened more than “two dozen grand jury investigations.”²⁴ This is a far cry from the 100 criminal cases the Reagan administration brought in 1984. As with international cartel enforcement, the Task Force effort needs critical examination.

33. Cartel enforcement is not just about criminal prosecution. Section 4A of the Clayton Act allows the federal government to sue for treble damages for injury to its business or property caused by an antitrust violation.²⁵ This wildly underused provision received life support in 2018, with a case brought for price-fixing of fuel contracts to the US military, but 4A appears to be languishing in poor health once again.²⁶

34. Section 4A is such an easy target for Biden administration enforcement. Using it will provide an extra measure of deterrence in cartel cases as well as money for US taxpayers overcharged by price fixers. Think of all the pharmaceutical drugs the federal government buys!²⁷

²³ Enforcement data can be found at <https://www.justice.gov/atr/division-operations>.

²⁴ See M. Delrahim, Ass’t Attorney Gen’l, Antitrust Div., Dep’t of Justice, “Here I Go Again”: New Developments for the Future of the Antitrust Division at 7–8 (Nov. 12, 2020), <https://www.justice.gov/opa/speech/file/1336536/download>.

²⁵ See 15 U.S.C. § 15a.

²⁶ See H. First & S. W. Waller, Pairing Public and Private Antitrust Remedies, in *Albert A. Foer Liber Amicorum: A Consumer Voice in the Antitrust Arena* 110 (Concurrences, 2020), <https://ssrn.com/abstract=3417356>.

²⁷ For a discussion of some of the issues in such litigation, as well as the policy implications of using 4A, see *ibid.* at 118–19.

IV. Rethink key approaches

35. There have been many critiques of the state of antitrust law, but the more fundamental ones go beyond a particular court decision or case not brought. For several years now, critics have made the case that, in spite of antitrust enforcement, market concentration has increased, price/cost margins have widened, new entry has been weak, labor’s position has worsened, and inequality has increased. We need a rethink. Here is our short list of areas for rethinking.

1. Consumer welfare

36. Let’s get rid of this as the guiding phrase for antitrust enforcement. It is either so broad as to be meaningless or so narrow as to dig us deeper into denial of economic power. It has been interpreted as meaning that only output is “what the antitrust laws care about,” as Justice Gorsuch said in oral argument in *Ohio v. American Express*. It is hard to believe that we should guide antitrust law by this metric in a digital economy where the problem is not restricting output and raising prices. Google does not want to restrict the amount of search we can have; Facebook does not want us to have fewer friends. Why not replace it with a differently formulated goal—market process in the interest of the people?

2. Error-cost analysis

37. Why did antitrust enforcers and courts become so worried about making mistakes? And why did that concern then become a concern only about making the mistake of finding liability when we should not (false positives) rather than about making the mistake of finding no liability when we should (false negatives)? Unless the concerns for false negatives are considered along with false positives, this approach to antitrust decision-making should be abandoned.

3. Power

38. Antitrust regimes around the world take a more realistic view of what constitutes economic power than does the United States. They set a lower threshold for “dominance” than we do for “monopoly,” and have a wider appreciation of economic power, often judged by the existence or not of constraints on the putative dominant firm rather than only on output reduction and price rise. The current debate around the world includes whether economic power should be viewed more situationally. Should we consider abuse of superior bargaining power in addition to abuse of dominance? When some unusual event gives sellers the power to exploit consumers, does it matter that this power might dissipate quickly? This is the question being asked in the debate over whether price-gouging during the COVID-19 pandemic should be

of concern to antitrust law. Or if workers are exploited by strong employers, say with no-poach and non-compete agreements, should this type of buyer power be a concern of antitrust law, whether or not output or consumer surplus is lessened?

4. Industrial and trade policy

39. The US antitrust community has long abjured consideration of industrial policy in antitrust cases. China, the second-largest economy in the world and one that has a loose relationship with free markets and private enterprise, has always melded industrial policy into its antitrust enforcement. It does so non-transparently and strategically, even while it usually applies its own and world competition law standards. EU competition law generally resists industrial policy—e.g., to authorize a merger that would create a national champion to stand up to China—but the Competition Directorate-General is under pressure to change course.

40. In the course of applying antitrust law, it is going to be hard for the Biden administration to avoid considering broader effects on the economy, foreign trade, and competitiveness. It may be that pressures to preserve US enterprises and jobs will need to be accommodated in US antitrust decision-making, even though many in the antitrust world wish it were otherwise. Rather than ignoring these issues, antitrust enforcers should be transparent when considering these broader impacts and avoid politicized decision-making. A seat at the CFIUS table for the Antitrust Division might help. So might more attention to developing market-friendly industrial policy.

IV. Conclusion

41. For at least a half a century, there has not been greater dissatisfaction with the arc of antitrust enforcement. The incoming Biden administration has an opportunity to make real change.

42. Unfortunately, there are substantial roadblocks in the way of certain significant and warranted reforms, including legislation that would reverse burdens on megamergers and that would reverse presumptions in substantive law that repeatedly and cumulatively favor dominant incumbents and solidify their power. We suggest here changes that are achievable in the near-term and, we think, would be consequential.

- Restore integrity at the Justice Department.
- Rejoin the world conversation on antitrust policy, striving to develop a consensus view on digital economy and a global approach to global mergers.
- Reinvigorate US antitrust enforcement by starting with an achievable first-year agenda: legislation for civil penalties and increased enforcement budgets; broadening the FTC’s work through rulemaking and a more robust conception of anti-competitiveness under FTCA Section 5; reversing bad antitrust/IP policy at the Justice Department; and restoring vigorous cartel enforcement.
- Rethink and revise to accord with reality some core assumptions that have too readily been accepted in antitrust law.

43. Four years ago we were worried about the direction that antitrust might take in an America-First world. Today we are hopeful, not worried. We think great changes really do lie ahead. ■

Competition policy under the new administration

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1. The assignment to write about President-elect Biden's antitrust policies could hardly have come at a worse time. As of mid-December, when I am writing, Mr. Trump has not yet conceded that he lost the election, despite a gap of about 7 million votes, his attorney general saying there is no evidence of massive fraud, and the Supreme Court twice giving his lawyers a collective shoulder cold enough to preserve Pfizer's vaccine. A fundamental determinant of the political possibilities for the next four years will not be known until the results of two Senate races in Georgia are counted (and probably recounted) in January. The incoming administration has not yet announced a nominee for attorney general, much less the specific persons who will most influentially shape antitrust policy.

2. Make no mistake, the top people at DOJ and the FTC always have great discretion to influence priorities. Occupational sociology is an important key to the policies that will eventuate. Will the top people be the traditional big-firm antitrust lawyers with some prior government experience in Washington? Will they have ties to the tech platforms that are likely to take up much of the incoming administration's attention? Any chance we will see positions of leadership for a plaintiff-side lawyer or an experienced state antitrust enforcer or even a post-Chicago economist? What about someone who is on record in favor of major changes in the direction of antitrust, not merely small-scale reforms—a Thurman Arnold for our time? And some additional important questions: Will the selected second-level leaders be in synch with the new White House and its attorney general on policy direction? Will they heal the morale problems in their agencies brought about by the extreme partisanship of the country, the Trumpian attacks on the civil service, the gaps that have expanded between DOJ and FTC?

3. Antitrust does not float in a vacuum. The Biden administration's antitrust policies must somehow be fitted into the larger picture of the massive challenges this administration will be facing: first, ending the pandemic; second,

reopening and rebuilding the economy after a year of on-again, off-again close-downs; third, entering into a more diplomatic international mode; fourth, addressing the magnified problems of poverty, welfare, racial injustice, immigration, health care, education, and physical and environmental infrastructure; and maybe fifth, figuring out how to handle such competition policy issues as industrial concentration, high-tech platforms, the loss of small and medium-sized businesses, privacy and data security, labor in an evolving sharing sector, and more.

4. Other observers may order their list of the administration's priorities differently, but it appears to me that the problems of antitrust will largely be problems of a more encompassing competition policy nature involving multiple decision makers, and they will necessarily be relatively low on the administration's overall agenda, no matter which party controls the Senate. Moreover, at a time when so much will have to be spent on rebuilding the economy, budgets for each component of competition policy may be tight. I am not a deficit hawk, but we are probably going to have to give more attention to efficiencies in the overall governance of competition policy.

5. With this background, I want to suggest that this would be a particularly apt time to enlarge the discussion from antitrust to competition policy. By competition policy—the label now in more use globally than the narrow and rather repellent American word “antitrust”—I mean to include the actions available not only to the DOJ and FTC, but to all the federal and state agencies whose responsibilities include an impact on competition. This includes such regulatory subject matter as tax policy, intellectual property, trade, information technology and communications, small business, national security, sectoral regulation, public health, and perhaps more.

6. It is a large group, when you think about it—but we ordinarily do not think about it this way. We are not used to seeing these various governing activities conducted under a unifying strategy any more thoughtful or instructive than the typical presidential campaign's emphasis on “more government intervention” or “less government intervention.” Inconsistencies and contradictions, uncertainty, and lost opportunities are built into our

* The author is writing in his own behalf.

creaky fragmented governmental structure. The problem for competition policy is less a deep state or a dismal swamp than an overly fractured system. And this is not a question of whether there should be both an independent FTC and an executive branch Antitrust Division of the Justice Department.

7. The idea of an Office of Competition Policy has been raised by the Washington Center for Equitable Growth. This is intriguing, as a creative possible approach early in the new administration that requires no legislative go-ahead. The idea would be institutionalized within the National Economic Council in the White House. The NEC was established in 1993, based on several earlier formats, to coordinate economic policy and advise the president. Its members have in recent years been various members of the cabinet and sometimes heads of other relevant agencies, but neither the DOJ nor the FTC has been included, nor have the heads of divisions or independent agencies with particular responsibilities that impact on competition. Exactly which agencies should be represented within the Competition Policy Office would have to be carefully sorted out. One tool available to the CPO would be convening meetings of the competition-impacting leaders of relevant federal agencies, both executive and independent. This whole project could take inspiration from the Obama administration's Executive Order of April 15, 2016, which stated, in part, "*Promoting competitive markets and ensuring that consumers and workers have access to the information needed to make informed choices must be a shared priority across the Federal Government.*"

8. The CPO's functions could be both to gather and share information and to centrally jawbone for coherent activity among the multitude of policies that affect competition. The sharing of information and policy concerns in these (hopefully) transparent meetings would identify where inconsistencies exist and whether they should and can be accommodated.

9. The CPO would formalize a role for high-level strategic planning and coordination. It might help cope with the tight money problem by better coordination of available assets and could also help clarify the relationships we want to have between the public and private sectors. This type of coordination, to the extent it develops, could be integral to a strategy for re-establishing public confidence in the civil service, a demonstration that the right hand and left hand (and all other hands on deck) are working

both with a considered division of labor and together, with a greater sense of overall coherence at the planning level. Predictability for all would be enhanced as existing expertise would be shared within the government on a broader and more regular basis, under the aegis, but not the overly centralized command, of the national executive.

10. We Americans both love and hate checks and balances. In view of our recent negative experience with proponents of "a unitary executive," there might be an appropriate fear that something like an overall competition czar would evolve, placing too much power in the chief executive, inevitably leading to politicization of competition policy under control of a White House that could insist on policies that help its political supporters and punish its foes, or—the bugaboo of central planning—make one big centralized mistake with terrible consequences. The framework of a CPO would have to make it especially clear that the new layer can focus attention but cannot itself mandate actions, which would continue to reside in their current organizations, subject to the existing or new statutes and regulations, in the context of the pre-existing pressures from the White House, statute-interpreting courts, and ever-jealous congressional committees.

11. At a high level of general policy, such as openly targeting certain industries for priority focus, this could foster more transparent, more predictable, and more efficient government. The rule of law, however, must be protected by clear sanctions against political interference in specific law enforcement investigations and cases.

12. The idea of national competition policy objectives would not necessarily imply that there must be more (or less) competition in any given sphere of policy or even overall in the economy. As I see it, government decision-making should be highly contextual, with the intention of seeking the mixture of competition and cooperation, private discretion and government regulation that is most appropriate for the area on which it is focused. Decision makers at various levels need to respond not only to statutes and regulations, but where there is room for discretion should also consider customary behaviors, history, culture, economic analysis, administrability, resources, and politics—a complicated task too daunting for centrally commanded execution. But general direction and priorities can be expressed centrally as feeding into the decision-making process at the agency level. ■

Antitrust enforcement in a Biden administration

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1. As we now emerge from what fairly can be characterized as an unprecedented presidential election from any number of perspectives, the usual speculation is well underway regarding what antitrust enforcement will look like under the new administration. Such speculation always involves a heavy dose of tea leaf reading, especially when the incoming administration represents a different party than the outgoing administration. The same holds for this election cycle, and, indeed, politics may play a larger role than usual in defining the antitrust agenda for at least the next four years.

2. In this paper, we explore some of the reasons that make it more difficult than it might otherwise be to predict where antitrust enforcement is heading. For example, while reports have already indicated that current leadership of the Antitrust Division and the FTC will depart quickly, it is not clear how quickly new leadership will be in place, especially who the FTC commissioners will be, or even if Democrats will have a majority of seats on the Commission. How quickly agency leadership is clarified may determine how pending matters proceed, with reports already surfacing that major enforcement decisions are now being impacted. And, will there in fact be an antitrust doctrinal transformation resulting from legislation or enforcement priorities as called for by, among others, the House of Representatives, or will there be a continuation of current enforcement efforts, which many see as already seeking to expand the boundaries of settled antitrust principles?

I. Who will lead?

3. Leadership of the Antitrust Division and FTC, of course, will define the agencies' enforcement agendas. But how quickly leadership will be in place is unknown. In 2017 Assistant Attorney General (AAG) Delrahim was not confirmed and in place until more than eight months after the inauguration. In the interim period, career staff served as acting AAG and in leadership roles from January until April, when newly appointed deputies took over. The FTC had only two commissioners for many months following the inauguration in 2017, and, while efforts no doubt were made to take Commission actions by consensus, it is fair to say that the Commission was not operating optimally until the full complement of commissioners was in place.

4. So what is the situation now? AAG Delrahim has announced that he is departing in January 2021. Most likely that will mean a turnover of the Antitrust Division's front office at about the same time. How quickly the Biden administration moves to identify potential AAG candidates is unknown, but, if past is prologue, such a decision may not be the highest priority on the new administration's agenda. Then, the question will be how long it will take before the Senate confirms a new AAG. Much may depend on the outcome of the Senate races in Georgia, and, if Republicans retain control of the Senate, on the whims of the majority leader.

5. The FTC presents a more complex picture. Rumor has it that Chairman Simons is thinking about leaving imminently. This will be well short of the end of his term in September 2024. Of the remaining commissioners, Commissioner Chopra's term has expired, and he is serving until he either leaves or is replaced; Commissioner Slaughter's term ends in September 2022;

* The views expressed herein are solely those of the authors, and do not necessarily reflect those of Morgan, Lewis & Bockius LLP or any client of the firm.

Commissioner Phillips's term ends in September 2023; and Commissioner Wilson's term ends in September 2025. It is possible, therefore, assuming that current Chairman Simons leaves as rumored, that a Democrat replacement can be announced, but pending confirmation there will be a 2–2 split of Democrat- and Republican-appointed commissioners. Even though one of the Democrat-appointed commissioners would likely be named chair, deadlock is a real possibility. And if, for example, Commissioner Chopra were to be named to lead the Consumer Financial Protection Bureau, as rumored, and if he is confirmed for that position before new Democrat-appointed FTC commissioners are confirmed, then it is possible that there will be only three commissioners in place, with Republican-appointed commissioners holding a 2–1 majority and the remaining Democrat-appointed commissioner acting as the chair. In other words, the potential that the FTC will be stymied in taking any Commission actions, at least for some time into the new administration, is a real possibility.

II. How will pending matters proceed?

6. With respect to both the Antitrust Division and the FTC, pending matters—whether in the investigation stage or already in litigation—will continue apace. Some turnover of staff will naturally occur, but many of those now working on pending matters, including senior Section leaders (at the DOJ) or Division leaders (at the FTC), will remain in place and move matters along.

7. That said, reports have already pointed out that both agencies may face staffing and budgetary constraints. For both agencies the costs of litigation, and especially experts, are reportedly straining their budgets. And the agencies' existing litigation efforts are straining internal resources. We do not, however, envision that these practical factors will have a meaningful impact on the agencies' enforcement agendas.

8. It is likely, therefore, that the Antitrust Division will continue to press recent lawsuits and investigations, including those pursued along with various state attorneys general, into “Big Tech” conduct. Given their subject matter and at times aggressive doctrinal theories of these matters, they will likely be welcomed by new Division leadership. The Division's criminal cases will also likely be unaffected by the political winds.

9. The FTC also has a busy docket that is likely to be unaffected by the change in administration. It continues to bring new cases, both in the courts and as administrative proceedings, challenging both mergers and alleged anticompetitive conduct. This includes, with respect to mergers, recent lawsuits to block hospital mergers and Procter & Gamble's acquisition that would allegedly reduce competition for women's razors, and the lawsuit to unwind Altria's investment in Juul. On the behavior side, the FTC is coordinating with state attorneys general to

advance its own aggressive doctrinal theories in well-publicized “Big Tech” cases. Notably, the FTC's recent litigations have proceeded with bipartisan (if not unanimous) support from current commissioners.

10. A bigger question exists about how the agencies will act to resolve pending matters when investigations are complete, or when “top-of-the-house” litigation decisions are necessary to proceed with or resolve cases. Even if interim agency leadership would prefer to wait for the incoming Biden administration leadership to make important decisions, that may not be possible if statutory—including merger reviews under the Hart–Scott–Rodino Act—or court-imposed deadlines require immediate decisions. And this includes what may happen between now and Inauguration Day.

11. For example, there are a number of closely watched merger reviews underway where decisions may be made before Inauguration Day, or, if not, they may languish until new leadership is in place. For example, the Aon-Willis Towers Watson merger of two of the top three insurance brokers is now under review by the DOJ. The parties announced a targeted completion in the first half of 2021, but, depending on the state of DOJ leadership, that date may be ambitious. Both agencies, current activities notwithstanding, may also reconsider bringing certain litigation, or certain theories, in light of a string of losses in cases where courts have rejected government economists' opinions related to market definition and anticompetitive effects as unsupported. Even if these outcomes do not slow challenges directed by incumbent agency leaders and staff, it may lead to a reassessment of how economic proofs will be used in currently pending and forthcoming litigations.

12. Other matters may also be impacted by a delayed changeover of agency leadership. For example, if there are pending requests to the Antitrust Division for business review letters (BRLs), those requests will likely remain unanswered until there is at least an acting AAG appointed. Such delay occurred at the start of the prior administration when the BRL from the Antitrust Division in connection with the launch of a real-time payments system by The Clearing House Payments Company was not issued until September 2017 by then Acting AAG Andrew Finch. The BRL request had been pending for almost one year.¹

13. In short, Antitrust Division and FTC investigations and cases will continue as new leadership emerges. Nonetheless, the potential for inaction, delay, and uncertainty exists during the interim period.

¹ Mr. Taffet represented The Clearing House Payments Company in connection with the Antitrust Division's BRL; see Letter from Andrew C. Finch, Acting Assistant Att'y Gen., US Dep't of Justice, to Richard Taffet, Esq., Morgan, Lewis & Bockius LLP (Sept. 21, 2017) (replying to the Letter from Richard Taffet, Esq., Morgan, Lewis & Bockius LLP, to Renata Hesse, Acting Assistant Att'y Gen., US Dep't of Justice (Oct. 11, 2016)).

III. Will we see a doctrinal transformation?

14. Numerous voices are calling for a “reimagining” of antitrust laws to broaden their scope to address effects beyond what some consider a narrow focus on just price and output. Many proposals are included in the House of Representatives’ report on Competition in Digital Markets.² These proposals mirror separate legislation introduced by Senators Warren and Klobuchar, and most recently the Washington Center for Equitable Growth’s report, *Restoring competition in the United States*,³ reasserts many of the same points.

15. Among other things, these proposals support revising the antitrust laws in relation to mergers and enforcing Section 2 of the Sherman Act in relation to unilateral conduct by dominant firms. While the House report focuses on large-platform companies, it and other proposals would have broader reach. They would, for example, override numerous precedents, recognize greater risks of under-enforcement of the antitrust laws rather than over-enforcement, and diminish the necessity of establishing relevant markets to prove an antitrust violation where there is direct evidence of market power.

16. More specifically with respect to mergers, proposals include adopting bright lines and presumptions of likely anticompetitive effects; lowering the showing necessary to establish a violation of Section 7 of the Clayton Act from likely “substantial” anticompetitive effects to likely “material” anticompetitive effects; shifting the burden of proof to those defending mergers to show the absence of anticompetitive effects; and increasing scrutiny of vertical and “nascent” competitor transactions, with a presumption of unlawfulness if a dominant firm is buying a startup competitor or a prospective competitor in an adjacent or related market.

17. For enforcement of Section 2, these proposals target numerous precedents. They would override the Supreme Court’s *Spectrum Sports*⁴ and *linkLine*⁵ decisions, as well as the Ninth Circuit’s decision in *Alaska Airlines*,⁶ and recognize “leveraging” as an antitrust violation—i.e., where a dominant firm uses its monopoly in one market to gain a “privileged” position in a second market even without a showing of the elements of an attempt to monopolize claim. Proposals would also override the Supreme Court’s *Brooke Group*⁷ and *Weyerhaeuser*⁸ decisions and eliminate the need to show recoupment to establish a predatory pricing theory; and cause to revisit the Supreme Court’s *Trinko*⁹ decision to support essential facility theories and expand the scope of refusal-to-deal cases. The Ninth Circuit’s recent decision in *FTC v. Qualcomm* has also been targeted for criticism. And,

9 *Verizon Commc’n v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

with respect to both Section 2 and Section 1 claims, the Supreme Court’s *American Express*¹⁰ decision, and the district court decision in *United States v. Sabre*,¹¹ would be revisited to eliminate the need to show anti-competitive effects on both sides of a platform—or two-sided—market.

18. Whether legislation will successfully achieve all of these proposals is far from certain. Again, the outcome of the Georgia Senate races may play a role. Regardless of the outcome of those races, however, the chances of significant legislation revising the antitrust laws as proposed are uncertain; Republican and moderate Democratic senators have already voiced moderating views on many of the proposals.

19. That is not to say that efforts to “reimagine” the antitrust laws will be pursued other than aggressively by new agency leaders. For example, the same types of advocacy efforts by the current Antitrust Division could continue through filing Statements of Interest and amicus briefs, but with a decidedly different substantive focus. Commissioners Chopra and Slaughter recently signalled their desire for far more vigorous vertical merger enforcement by dissenting from the FTC’s issuance of the Vertical Merger Commentary on December 22.¹² A new FTC chair could also reorient the Commission’s Section 6(b) studies to focus on topics such as the potential for anticompetitive effects related to privacy and data security practices. And if Congress substantially increases funding to the agencies, as has been proposed, that would lead to hiring more attorneys and economists and more active enforcement of the antitrust laws.

20. Ultimately, whether a sea change occurs in antitrust doctrine will depend on the courts. Here, the picture may not look as rosy for those advocating more aggressive enforcement. The current composition of the Supreme Court suggests, if anything, that established precedent will be strengthened in connection with theories like leveraging, refusals to deal, and the need to establish anticompetitive harm in defined relevant markets. Already before the Supreme Court is Comcast’s petition for certiorari in *Viamedia*.¹³ Recently, the Supreme Court invited the views of the DOJ on the issues presented. This follows the DOJ’s amicus brief to the Seventh Circuit, supporting neither party, but advocating for a narrow role for antitrust in refusal-to-deal cases and the adoption of the “no economic sense” test supported by then-Judge

10 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

11 *United States v. Sabre Corp.*, 452 F. Supp. 3d 97 (D. Del. 2020), *vacated*, No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020) (the parties abandoning the transaction mooted further proceedings).

12 Joint Dissenting Statement of Commissioners Rohit Chopra and Rebecca Kelly Slaughter Regarding the Vertical Merger Commentary, File No. P181201 (Dec. 22, 2020), (“We look forward to turning the page on the era of lax oversight and to beginning to investigate, analyze, and enforce the antitrust laws against vertical mergers with vigor.”), https://www.ftc.gov/system/files/documents/public_statements/1585062/p181201chopra-slaughtervmedissent.pdf.

13 Petition for Writ of Certiorari, *Comcast Corp. v. Viamedia Inc.*, 335 F. Supp. 3d 1036 (7th Cir. 2020) (No. 20-319).

Gorsuch in *Novell, Inc. v. Microsoft Corp.*,¹⁴ which insulates conduct from antitrust liability where there is a justification for the conduct other than to harm competition. *Comcast*, thus, may be a vehicle for the Supreme Court to address standards for refusal-to-deal cases, and even narrow further the *Aspen*¹⁵ exception for such claims.

21. There is a similar dynamic relating to merger enforcement, where courts have established a well-worn path for analyzing horizontal mergers, and it may be difficult for more aggressive antitrust agencies to effect a sea change. There may be more space for aggressive action relating to vertical mergers because of the limited precedent. However, it is an open question whether the courts would be open to these types of challenges, particularly after the DOJ's unsuccessful attempt to block AT&T's acquisition of Time Warner.

22. The transformation of the federal judiciary at the district and appeals court levels under the outgoing administration may also make sweeping antitrust doctrinal changes less likely. The Ninth Circuit is an example. That circuit, historically, may have been receptive to advocacy supporting expanded antitrust liability, but now Republican administrations have appointed approximately 45% of active-status judges on the Court

of Appeals for the Ninth Circuit, with 10 of 29, or approximately 34%, having been appointed during the Trump administration; the percentage of Ninth Circuit Republican appointees increases to a slight majority, 24 of 47 or approximately 51%, when senior-status judges are considered.¹⁶

23. This suggests that the academic debate regarding the proper scope of antitrust laws will continue with vigor during the next administration. What impact that has on actual doctrine or a great deal of precedent, however, is far less clear.

IV. Conclusion

24. Over the next few months, leading up to and following the inauguration, we should gain a much better picture of whether there will be any meaningful changes in antitrust enforcement by either the Antitrust Division or FTC, and eventually we shall see if new liability theories take root in agency advocacy and court decisions. In the meantime, as is the tradition when administrations change, we all can continue to speculate. ■

¹⁴ 731 F.3d 1064 (10th Cir. 2013).

¹⁵ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

¹⁶ See United States Courts for the Ninth Circuit, The Judges of this Court in Order of Seniority (updated July 2020), https://www.ca9.uscourts.gov/content/view_seniority_list.php?pk_id=0000000035; Federal Judicial Center, Biographical Directory of Article III Federal Judges: Export (use the "Export organized by category" option and filter the "Federal Judicial Service" sheet by "Court Type," "U.S. Court of Appeals," "Court Name," "U.S. Court of Appeals for the Ninth Circuit," and "Termination" is "Blanks" for active and senior-status judges). To further filter out senior-status judges filter "Senior Status" is "Blanks;" <https://www.fjc.gov/history/judges/biographical-directory-article-iii-federal-judges-export>.

Biden antitrust: “Building” antitrust enforcement “back better”

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1. The election of Joseph R. Biden, Jr. and Kamala D. Harris is a transcendent event for our nation and our world. It is also a moment of enormous opportunity for antitrust enforcement and competition policy. With a president and vice president passionately dedicated to the rule of law and to the prosecutorial independence of the Department of Justice and the Federal Trade Commission, the enforcement of antitrust law and the development of competition policy will be in capable hands that can build on our past and shape the future. Given the globalization of competition policy over the past two decades, we can also expect the United States to renew its commitment to work with willing allies in the international competition law community.

2. This is a very different portrait than the one I painted in this space four years ago. Based on Mr. Trump’s campaign statements, many in the antitrust community were concerned with his assertion that “he” would not allow the AT&T/Time Warner merger to proceed, taking into account neither the independence of the Department of Justice from the White House in making case decisions nor the fact that the decision to stop the merger would be made by a federal judge, not the President. This “I alone” tendency that many of us warned of in 2017 had grave consequences for the independence of the Department of Justice over the past four years—from the *AT&T/Time Warner* merger to the Department’s characterization of Mueller investigation.

3. This article will provide three modest reflections on how the Biden administration can build a better, stronger and more successful antitrust program at both the Antitrust Division and the Federal Trade Commission. The first two reflections relate to specific enforcement initiatives—monopolization and cartel enforcement. The third concerns the need to reclaim the prosecutorial independence of the Department of Justice and to restore

a positive culture to the agencies. These reflections are based on observing the agencies from the inside for 10 years and appearing before the agencies over 35 years. What this article will not do is provide analysis of specific cases or policies—I am confident that my colleagues in the antitrust bar will focus more than enough attention on the *Google* and *Facebook* cases, among others.

I. Shaping antitrust law—monopolization

4. The new leadership of the agencies must combine the practicality of everyday enforcement with the more theoretical path of shaping the law and developing competition policy. In the past, we have experienced administrations which viewed their duty as limited to clearing out the inbox—essentially, responding to or investigating complaints, much like the Better Business Bureau—while others focused largely on the theoretical—essentially running Chicago School seminars while showing little interest in practical enforcement. The Division chiefs of both political parties that we remember and revere—e.g., Kauper, Baker, Shenefield, Litvack, Rill, Klein and Baer—took seriously their obligation to be effective enforcers and to shape antitrust law and policy at the same time.

5. My 10 years at the Antitrust Division and 35 years of practice before the Division have taught me that antitrust is more than individual enforcement actions or economic analysis, it is the manifestation of the free market. Antitrust is not a form of regulation; it is the absence of regulation—it drives me crazy whenever I hear anyone describe U.S. antitrust law as “regulatory.” Antitrust is national enforcement of law and policy, defined by a common set of economic principles, and interpreted and decided within a complex litigation system. In contrast, most international competition law and policy is based on a regulatory system, and not a court-centered process determined in the crucible of

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evidence and cross-examination. Most other jurisdictions around the globe focus on the concept of dominance, which generally has required a lower standard of proof than the U.S. standard of monopolization.

6. Within that framework, the Division and the FTC often have challenged industries and industry leaders over the decades as a means of shaping the law. The Biden administration walks on the stage at a critical moment when the *Google* and *Facebook* monopolization actions are newly filed—and those cases are complicated legally and politically by the entry of many state attorneys general into the litigation. As the new leadership of the agencies takes control of these cases, it will certainly study the history of the big monopolization cases of recent times, lest they repeat that chaotic history. The similarities to the *IBM* case in particular are notable. The Division's challenge to *IBM*'s alleged monopoly was filed on the last business day of the Johnson administration and dismissed during the Reagan administration—some 14 years later. As the case worked its way through massive document review and testimony by hundreds of witnesses, the industry took on a form far different than it was in 1969. That made the case irrelevant.

7. The *AT&T* monopolization case, despite great efforts within the Division, could have suffered the same fate as *IBM* as it moved through three administrations, but for a determined judge who skillfully moved the case to trial and forced *AT&T* into history-making divestitures that the hapless giant had no choice but accept. The telecommunications markets have never been the same—and the world is far better off as a result.

8. Finally, in the landmark *Microsoft* case, the Division brought the case to trial relatively quickly with solid evidence and excellent district court and appellate rulings. With a change of administrations, the case then suffered a fate similar to that of *IBM*. *Microsoft* was allowed to negotiate a very favorable settlement that greatly limited the impact of the hard fought rulings.

9. The Biden administration's Antitrust Division and FTC leadership will have the benefit of history as they take over the recently filed *Google* and *Facebook* cases. With the *Google* trial date now set for September 12, 2023, the Division has time to build a strong case and move briskly to trial. The history of *IBM* and *Microsoft* teaches that the Division must steadfastly hold to that trial date.

10. The Antitrust Division and FTC leadership will face greater challenges in shaping the law because *Google* and *Facebook* are being prosecuted by different federal agencies with virtually every state attorney general in the mix. The complexity is compounded by the prospect of other monopolization cases against, e.g., Amazon and Apple. This is, indeed, an immediate opportunity to shape the law and develop an enforcement consensus on the issues in these cases and others. The eyes of the nation and the world will be on the progress of these cases, and the agencies must make sure that the cases are consistent in shaping the law. The key question is: which agency should make these determinations? Who should build the legal theories and the evidence in the cases to

make certain competition policy is consistent—or at least not contradictory? Without complicating matters in a very busy time, I would encourage the administration to establish a Competition Policy “czar” to provide counsel, coordination and oversight for policy direction and litigation relief plans for major monopolization cases. The “czar” would perform a role similar to Dr. Alfred Kahn's role on deregulation and inflation in the Carter administration -- a very small office, not a bureaucracy. The “czar” could also be responsible for proposing legislative changes in the monopolization area that arise from these major cases. Because of our two-agency and 51-state AG system, someone must make these determinations. Without this focus, we could have four cases going in four directions—it could be chaos! Even if such a policy “czar” is not possible, the Division and the FTC, in conjunction with the states, need to have some group beyond the litigation teams to shape the cases. Coordination is the key to overall success in monopolization cases.

II. The revitalization and renaissance of cartel enforcement

11. The new administration must quickly and aggressively revitalize cartel enforcement. The Supreme Court in *Trinko* characterized cartels as “the supreme evil of antitrust.”¹ There can be no effective antitrust enforcement and competition policy without a comprehensive program to combat domestic and international cartels. It is a strong enforcement program that puts corporations and executives on notice that if they engage in cartel behavior, they will be severely punished. Without a record of serious cartel enforcement to chasten them, seasoned executives do not take seriously counsel's admonitions to stay away from that bright line of competitor contacts.

12. The Trump years had a very disappointing cartel record—and it did not improve significantly over time. During the last years of the Obama administration, the Division obtained over a billion dollars in fines in four consecutive years with the high point of \$3.6 billion in 2015; during the Trump administration, the corporate antitrust fines obtained were \$67 million, \$172 million, \$365 million and \$529 million—or a little more than \$1 billion for Trump's four years. The *Financial Times* reported that criminal antitrust enforcement under Trump is at its lowest point since the Nixon administration.² Why was the record so limited? There are several reasons. First, the Trump Antitrust Division had no top-tier leadership in the criminal/cartel area for a significant period. The departure of Deputy Assistant Attorney General Brent

1 *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).

2 K. Shubber, US Antitrust Enforcement Falls to Slowest Rate Since 1970s, *Financial Times*, November 29, 2018.

Snyder slowed the momentum of new investigations and cases, and the situation was made more acute by the fact that it took well over a year to choose his successor—and the successor had a significant learning curve since he was not previously in the Division’s senior leadership. At the same time, the departure of several of the most experienced and accomplished criminal prosecutors caused an appreciable “brain drain.” The “brain drain” started with the closure of four Division field offices in 2011 and the departure of many seasoned and talented prosecutors. The exodus of talent continued well after the Trump administration assumed office in 2017.³

13. At about the same time, the Division’s leniency program, which, for over 20 years was the most effective tool in the detection and prosecution of major cartels, became the victim of its own success as it was imitated by jurisdictions around the world.⁴ Under the leniency program, the first company that comes forward is not prosecuted, is not fined, and its executives are not charged or jailed. With size came more rules and procedures—and far less transparency.⁵ The Division issued new and more restrictive policies which caused potential applicants to resist the leniency option. With fewer leniency applicants to provide strong, prosecutable cases, criminal investigations plummeted and the quality of evidence in the cases the Division actually brought was weaker and resulted in more trials—and drained more resources from the Division.

14. To its credit, the Trump Antitrust Division attempted to control the damage and improve the number of investigations and cases. The Division tried to add incentives such as deferred prosecution agreements in situations where the company had an effective compliance program.⁶ Unlike the leniency program, the result of a deferred prosecution agreement usually requires substantial corporate fines, and, with notable exceptions, does not routinely protect cooperating employees. The use of deferred prosecution agreements, like non-prosecution agreements, is hardly a model of transparency or consistency. The leniency program is built on transparency -- and it will remain so. The problem—so far at least—is that the choice between seeking leniency, or deferred prosecution or other incentives, is too complex. The Trump Antitrust Division also set up a bid-rigging task force to investigate bid-rigging on government procurement—a commendable effort for training procurement officials for future investigations.⁷

3 For a detailed discussion of the U.S. Leniency Policy and its decline, see D. C. Klawiter, *The U.S. Corporate Leniency Policy: It Is Time for a Renaissance*, *CPI Antitrust Chronicle*, January 2019, available at <https://www.competitionpolicyinternational.com/the-u-s-corporate-leniency-policy-it-is-time-for-a-renaissance>.

4 *Ibid.*

5 R. B. Bell & K. Millay, *The Corporate Leniency Program: Did the Antitrust Division Kill the Goose that Laid the Golden Eggs?*, *Antitrust Magazine*, Vol. 33, No. 1 (Fall 2018).

6 D. C. Klawiter, “It Didn’t Work”: Antitrust Compliance and the Role of the Senior Executive, *CPI Antitrust Chronicle*, November 2019, available at <https://www.competitionpolicyinternational.com/it-didnt-work-antitrust-compliance-and-the-role-of-the-senior-executive>.

7 D. C. Klawiter, *U.S. Cartel Investigations: The Next Big Thing?*, *CPI Cartel Column* 2019, available at <https://www.competitionpolicyinternational.com/u-s-cartel-investigations-the-next-big-thing>.

15. Given the complexity and lack of transparency of the current cartel enforcement situation, it is critically important for the Biden administration to refocus cartel enforcement as soon as possible. I strongly recommend that the new leadership of the Antitrust Division reduce the confusion in cooperation situations and focus attention again on the leniency policy. The leniency program was first announced by Assistant Attorney General John H. Shenefield during the Carter administration and it was announced in its current form by Assistant Attorney General Anne K. Bingaman during the Clinton administration. What developed after the program was announced was a full-scale effort by the Division leadership to make potential applicants comfortable with applying for leniency. This became a full-scale “marketing” initiative. During the Clinton administration, senior Division officials met with leaders of the ABA Antitrust Section to get the perspective of counsel and their clients; they also met internally with Division trial lawyers to get their perspective. The key message that came out of these initiatives was: if you come forward with full cooperation, the Division will become your partner and do everything in its power to make the leniency application a success. The Division leaders were true to their word—and the leniency program flourished, bringing major international cartel cases, collecting billions in fines and creating an unprecedented enforcement record. Antitrust defense counsel understood leniency. They still do. Adding the choice of a deferred prosecution agreement to the Division’s arsenal lacks transparency and certainty and is confusing. Confusion will not result in cooperating corporations—or major cartel prosecutions.

16. The first public statements the Biden Division leadership should make to the antitrust bar should be the Division’s commitment to aggressive cartel enforcement and to an effective and transparent leniency policy. The leniency policy is what made international cartel enforcement the greatest prosecutorial success the Division has achieved. It will take the Division to great future successes as well.

III. The Biden difference: Culture and independence

17. The prosecutorial independence of the Department of Justice from the White House is the most cherished tradition of the Executive Branch. The Trump administration disclaimed that tradition; it falls to the Biden administration to restore it so that we maintain an effective system of law enforcement.

18. The most fundamental outside perception and internal change from the Trump administration to the Biden administration will be the return to the autonomy of the Department of Justice on enforcement issues. This

change will be the most significant since the mid-1970s in the aftermath of Watergate. As a newly minted Antitrust Division lawyer in the months following President Nixon's resignation, I vividly remember the sadness and despair of the Division staff as attention to the Division's mission was overwhelmed by the daily television drama of hearings and trials. Not only was the Department targeted, the Division was directly implicated because of direct White House interference in the ITT scandal. With the Carter transition in 1976–77, the Division's leadership instilled in the staff a major shift in culture and ethics that energized us in our mission and made us proud again to appear in court and say to judge and jury, "I represent the United States of America." This transition, 44 years later, should be—must be—as intensive and successful. Attorney General designate Merrick Garland comes from the same set of experience and has already spoken for this independence.

19. The Antitrust Division and the Federal Trade Commission operate at their best when the staff understands that its leaders are independent of the White House and where the staff is inspired and motivated by the stature and the character of the agencies' leadership. If the staff attorneys are treated as partners and respected colleagues in enforcement and policy development,

the staff will work around the clock—with enthusiasm and intensity—for the Division and FTC leadership. If the leadership is visible and accessible to the staff—and listens to the staff in good faith—the agencies will succeed in their cases and in developing a first class competition policy.

20. If, on the other hand, the leadership of the agencies treats the staffs as servants, or even enemies, who need to be watched and restrained—threatened and scorned—and rejected, the agencies will fail in even the most basic assignments and initiatives.

21. The Biden appointees will have an incredible reservoir of goodwill and energy among the hard-working staff that survived the drama and trauma of the last four years. They are excited, inspired and ready to work. Treat those staff as the dedicated experts they are. My single piece of parting advice is this: treat the women and men of the Antitrust Division and the FTC as President-elect Biden treats people—treat them as friends and professional colleagues and partners. Show humility and empathy. Together, you can achieve anything. If you do that, the great work of the Antitrust Division and the Federal Trade Commission will be built back better. ■

Unscrambling the eggs: Merger control in the new administration

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1. Recent years have seen a surge in concentration and a corresponding decline in competition in markets throughout the U.S., E.U., and other economies. These trends have focused attention on the weaknesses of antitrust in analyzing and resolving mergers that come before the agencies. There are recommendations for reforming that process which, if enacted, would represent needed improvements in how antitrust evaluates new mergers. But those reforms do not address existing market concentration resulting from permissive past antitrust, nor do they address the ongoing problem of mergers that are not initially challenged but prove to be anticompetitive later on.

2. Antitrust has been reluctant to reconsider past decisions and to initiate challenges against already merged firms. For the most part, the agencies have simply looked away, counting on entry and time to erode the firms' market power. On those occasions that they have intervened against such mergers, the typical response has been to impose some rules in an effort to limit the merged firms' anticompetitive behavior—rules that almost invariably fail to correct a problem that is inherent in the structure of the market.

3. The new administration needs to confront the fact that past policy toward consummated mergers that prove to be anticompetitive has failed. That policy has effectively acquiesced in greater concentration and market power, and it must change. The new administration should make clear that initial decision not to challenge a merger does not confer immunity for later anticompetitive actions. It must emphasize that initial decisions are based on predictions and when those predictions prove clearly erroneous and harmful, it can subsequently take action—action that includes reversing the merger so as to return the industry to its premerger state.¹

4. Proposals along these lines are routinely met with the assertion that any attempt at undoing a merger is tantamount to “unscrambling the eggs”—literally impossible, or so difficult and costly as to be impractical, or so disruptive as to jeopardize the viability of the divested parts of the previously merged firm. This argument is repeated endlessly, and usually has the effect of terminating serious discussion of the possibility. As we shall describe, that characterization is demonstrably false.²

5. To be sure, a policy of breaking up consummated mergers should not become the norm. It should not substitute for best agency efforts at *ex ante* determination of the effects of a prospective merger. A definitive initial determination allows the company to move on and make ordinary decisions about business strategy, finance, and operations. It allows the agency to move on, rather than adopt an oversight, monitoring, regulatory perspective. Certainly, too frequent *ex post* intervention would undermine the market process and the policy process. And despite ultimate benefits to consumers and competition, it would also impose costs on all parties.

6. But these considerations should not preclude *ex post* intervention. Most countries, for example, permit reopening merger reviews when the prospective merging parties are found not to have provided full and accurate information to the reviewing agencies.³ But even without compliance violations, initial determinations about mergers are ultimately predictions based on incomplete information at the time (and often asymmetric information favoring the companies), as well as the inherent uncertainty about future events that can result in unforeseeable anticompetitive effects of a merger. These factors can obviously result in initial clearance of mergers that prove to be anticompetitive.

1 As this is written, the outgoing administration has proposed this very remedy for the allegedly anticompetitive acquisitions of Instagram and WhatsApp by Facebook, acquisitions that took place in 2012 and 2014, respectively, and both approved at the time by the Federal Trade Commission.

2 For full analysis of our views, see J. Kwoka and T. Valletti (2020), *Scrambled Eggs and Paralyzed Policy: Breaking Up Consummated Mergers and Tech Companies*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3736613.

3 OECD (2014), *Report on Roundtable on Investigations of Consummated and Non-notifiable Mergers*.

7. As we shall now describe, the agency should adopt policies to minimize these occurrences but at the same time it should not hesitate to take the necessary action when past mergers have anticompetitive effects.

I. *Ex post* vs. *ex ante* intervention

8. The choice between *ex ante* and *ex post* policy actions has been extensively analyzed. A key factor is the crucial role of information limitations and prediction uncertainty, and a key finding is that when available information is more complete, the initial determination should be more conclusive, that is, subject to less frequent *ex post* intervention.⁴ The relevance of this in the case of merger control is the fact that the definitiveness of *ex ante* judgments has diminished over time, for two reasons.

9. One reason is the weakening of bright-line presumptions in competition policy.⁵ One prominent example is the shift from a structural presumption against large mergers in concentrated industries toward exhaustive investigations of most mergers. This has made *ex ante* policy decisions more difficult and more subject to error. This has had the further effect of making *ex post* evidence of actual effects more important, and *ex post* policy actions based on that evidence correspondingly more appropriate. Those actions include the possibility of breaking up consummated mergers. The restoration of an appropriate structural presumption—even a rebuttable one—would improve the predictability of policy and reduce the need for *ex post* actions.

10. The other factor complicating *ex ante* determinations has been the growing importance of mergers in sectors where prediction is inherently difficult and *ex ante* determinations more subject to error. Most especially, these cases include firms and markets undergoing rapid evolution or technological change. For such mergers any initial agency judgment—either to challenge or not challenge the merger—has a greater likelihood of being incorrect. In practice, the agency will likely err on the side of permitting the merger, since it will not be able to meet the burden of proving competitive concerns *ex ante*. For that reason, mergers with those characteristics are more likely to avoid initial challenge and therefore more likely to be revealed as anticompetitive only after the fact.

11. There are in fact several possible scenarios in which *ex post* intervention might be considered. For one, the agency might simply have made a mistake, even with information that was complete at the time. Alternatively, the agency in its initial decision might have been handicapped by imperfect or asymmetric information, so that

the anticompetitive potential of the merger is revealed only by its actual post-merger behavior. And thirdly, exogenous and unpredictable events may confer market power on the merged firm, market power that the premerger firms would not have obtained.

12. We do not here offer specific recommendations for each of these scenarios, but we would observe that the optimal policy would be based on costs and incentives. The relevant costs are the costs to consumers but also the administrative costs to the agency and the firms. Incentive issues arise for both the firms and the agency. A policy that limits post-merger agency actions even in cases of incomplete information, for example, would encourage firms to provide as limited premerger information—or even skewed information—as possible. On the other hand, a policy permitting *ex post* intervention under broad circumstances risks endless agency second-guessing, or worse, the substitution of *ex post* action for thorough *ex ante* review.

13. These various factors would need to be considered in formulating optimal policy. We emphasize, however, that the optimal policy would not be to avoid breaking up consummated mergers altogether.

II. The alternatives

14. The need for a policy that includes breaking up consummated mergers is underscored by the lack of good alternatives. We have already mentioned the usual policy of “looking the other way” and “hoping for the best.” But on occasion the agencies have attempted some action against a consummated merger that has proven to be anticompetitive. That alternative is for the agency to target and seek to prevent the specific anticompetitive practices of the consummated merger. But for that to be effective, it would be necessary to identify all such actions that raise concern, and then develop specific methods for challenging and preventing them.

15. Any such policy faces nearly insurmountable burdens, as illustrated by the Federal Trade Commission’s actions against the merger of the Evanston Northwestern Healthcare System and Highland Park Hospital. The merger was consummated in 2000 and challenged seven years later based on evidence of considerable price increase. While the FTC prevailed in its challenge, it ultimately decided that the long delay made “*divestiture much more difficult, with a greater risk of unforeseen costs and failure.*”⁶ The agency settled for a conduct remedy that sought to have the two hospitals, despite their common ownership, bid against each other in their insurance market. Few believed that any such remedy requiring the merged company to behave as two firms in one specific function had any prospects for restoring competition, and not surprisingly the evidence suggests it did not.

4 M. Ottaviani and A. L. Wickelgren (2009), Policy Timing Under Uncertainty: Ex Ante vs. Ex Post Merger Control.

5 J. Kwoka (2016–2017), The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns? 81 *Antitrust L.J.* 837.

6 *In the Matter of Evanston Northwestern Healthcare Corporation*, Docket No. 9315, Opinion of the Commission, available at <https://www.ftc.gov/sites/default/files/documents/cases/2007/08/070806opinion.pdf>.

16. A somewhat more recent experience involved the U.S. airline industry, which underwent four major mergers in the early 2000s. In 2013 the Justice Department initially opposed the last of these—that between US Air and American Airlines—based on concerns that the merger would facilitate industry coordination. DOJ then withdrew its objection, but less than one year later it had to open a formal investigation into illegal coordination among the airlines, essentially acknowledging the accuracy of its initial prediction. Despite that and despite considerable anecdotal evidence of parallel behavior and diminished competition in the industry, it took no action. As noted, non-response is the most common policy toward mergers that raise competitive concerns.

III. Case studies of breakups

17. In order to show the plausibility of a policy of breaking up consummated mergers, we have identified numerous cases in which mergers have been reversed by policy and even more in which companies themselves have reversed mergers and acquisitions. Divestiture, separation, and breakups of merged companies are simply not that unusual. A recent compilation found 47 such cases over the past 15 years. While most of these were matters of timing—mandated reversals of mergers shortly after their consummation, suggesting that they were the subject of investigations that simply had not quite concluded beforehand—several took place years after consummation, the longest more than five years after. These cases are of particular interest since integration of company operations is likely to have proceeded the farthest.

18. This case involving the longest delay was a non-reportable merger between the only two companies producing and selling magnesium plates for photoengraving. Consummated in 2007, the FTC challenged it in late 2012 and secured an agreement requiring that the acquiring firm, Magnesium Elektron, fully divest all the assets it had previously acquired. These ranged from manufacturing technology and intellectual property to customer lists and operating manuals. The necessary divestitures took place, the acquired company was reconstituted, and both companies appear to have survived this deconstruction and continued in operation to this day.

19. A yet more ambitious scenario arose in the case of MSC Software, which acquired both of its key competitors in certain engineering simulation software in 2003.

Some two years later, despite its initial decision, the FTC challenged the acquisitions and prevailed. The tech nature of the companies, however, had resulted in extensive integration of the acquired businesses into MSC's operation, precluding simple reversal of the acquisition. Instead, the FTC ordered MSC to facilitate the creation of a new competitor by replicating the key software it had acquired and licensing it royalty-free in perpetuity to a new competitor. This process appears to have succeeded in restoring the lost competitor and competition in the market.

IV. Lessons and conclusions

20. These and other experiences offer several lessons concerning breakups. Most importantly, breakups of consummated mergers are by no means unknown as solutions to competitive problems. They should be recognized as part of the toolkit of antitrust policy in the new administration, to be used as a complement to *ex ante* evaluations of the likely effects of mergers. They are more appropriate for use in cases where those *ex ante* predictions are more subject to error. This is often the case for tech sector mergers.

21. We recognize that breakups—even when they ultimately benefit consumers and competition—can result in costs to the firm and to the agency. As we have argued, these costs can be minimized by reducing the frequency of cases prompting such action, specifically, by implementing a presumption against mergers that predictably result in competitive problems after the fact even when those effects are not easily predicted *ex ante*. A well-structured policy along these lines would reduce instances of initial mistaken approval of mergers and benefit all parties.

22. The new administration needs to address many shortcomings of the antitrust process. While much focus has been on strengthening the review process for new mergers, we would emphasize that policy must also address how to deal with companies whose past mergers have proven to be anticompetitive. This includes past mergers but also new mergers that are not being challenged and prohibited because their anticompetitive potential cannot be established *ex ante*, but they nonetheless prove to be competitively harmful. The new administration should recognize that policy toward such cases must include the possibility of reversing such mergers. ■

Regulating digital platforms: Interoperability and data portability

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1. Unlike others who sought the Democratic nomination such as Elizabeth Warren,¹ President Biden did not make antitrust enforcement against the large digital platforms a priority. However, he did not rule it out,² and both Democrats and Republicans have targeted the large tech companies such as Facebook, Google, Amazon, and Apple in proposed legislation and court cases. We anticipate the Biden administration will continue or expand existing antitrust actions involving the policies of the major digital platforms that have been identified as reducing competition. These actions have often targeted the platforms' barriers to "interoperability" and "data portability" as key elements of alleged anticompetitive acts.

2. As discussed below, the United States (US) House of Representatives investigated competition in digital markets.³ The Democratic-controlled staff of the Judiciary Committee recently issued a report that contained numerous mentions of "data portability" and "interoperability" issues, as well as policy suggestions that President-elect Biden could adopt. The House Report found

that interoperability is "*fundamental to the open internet*," citing interoperability of email, as well as other services such as telephones.⁴ The House Report identified a litany of competitive issues involving data portability and interoperability. Overall, it identified a lack of interoperability and data portability as a switching cost that is a "*central feature of digital search and social media platforms*" which makes it difficult for users to migrate data from one platform to a competing platform.⁵

3. Subsequent to the issuance of the Judiciary staff report and before the Biden administration takes office, the US Federal Trade Commission (FTC) and a group of 47 US states plus the District of Columbia finished their investigation of Facebook practices and sued Facebook over allegations of anticompetitive behavior that created interoperability with Facebook's "*personal social networking services*."⁶ These complaints claim Facebook only allowed parties creating application programming interfaces (APIs) to access critical data if the third-party apps did not compete with Facebook's features or promote Facebook's competitors.⁷

4. Both Democrats and Republicans appear to have issues with some of Facebook's actions, and these concerns may be expanded to address similar issues for other

1 One of Elizabeth Warren's policy positions was the "*government must break up monopolies and promote competitive markets*" because big tech companies are "*Using Proprietary Marketplaces to Limit Competition*." Warren proposed to restore competition in the tech sector by first passing legislation that requires large tech platforms to be designated as "*Platform Utilities*" to be broken apart from any participant on that platform and required to meet a standard of "*fair, reasonable, and nondiscriminatory dealing with users*." Promoting Competitive Markets, Elizabeth Warren for President, available at <https://elizabethwarren.com/plans/promoting-competitive-markets>; How We Can Break Up Big Tech, Elizabeth Warren for President, available at <https://elizabethwarren.com/plans/break-up-big-tech>.

2 H. Woodall, 2020 hopeful Biden says he's open to breaking up Facebook, AP News, May 13, 2019, available at <https://apnews.com/article/71e998ad3b39486ca1dce220201b68b0>.

3 Majority Staff Report and Recommendations, Investigation of Competition in Digital Markets, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, 2020 (hereafter, "House Report"), available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

4 House Report, pp. 384–385.

5 *Ibid.*, p. 42.

6 *Federal Trade Commission v. Facebook, Inc.* (hereafter, "FTC Complaint"), paras. 2, 22–26, 136–149, 152–158, available at <https://www.ftc.gov/system/files/documents/cases/1910134fbcomplaint.pdf>; *State of New York et al. v. Facebook, Inc.* (hereafter, "State Attorney General Complaint"), paras. 133, 199–229, available at https://ag.ny.gov/sites/default/files/state_of_new_york_et_al._v._facebook_inc._-_filed_public_complaint_12.11.2020.pdf

7 FTC Complaint, paras. 23, 136–149; State Attorney General Complaint, paras. 199–205.

digital platforms. However, there are questions about whether antitrust laws are the best way to deal with these practices, or whether there should be a new regulatory scheme.⁸ The FTC’s complaint against Facebook only alleges “*unfair and deceptive practices*” under Section 5 of the FTC Act, and not the traditional antitrust laws embodied in the Sherman and Clayton Acts. Additionally, more will be written on the topic, such as Senator Klobuchar’s forthcoming book which will call for antitrust reform.⁹

5. To the extent that the Biden administration seeks common ground in competition policy between Democrats and Republicans,¹⁰ investigations of the actions of large digital platforms would appear to be a logical choice, and interoperability and data portability are likely to be key aspects of shaping remedies to any alleged anticompetitive acts. In this article, we first discuss the economics of interoperability and portability of data. We next discuss some of the key aspects of interoperability, data portability, and their impact on switching costs, as well as some specific issues relating to interoperability and data portability. We conclude by raising the question of whether correcting any potential abuses will be pursued only through antitrust cases in courts or also through legislation that creates explicit regulations of digital platforms.

I. The economics of interoperability, data portability, and switching costs

6. Data portability is when users can download a snapshot of their data in a form that can be uploaded to another supplier. Interoperability is a type of data portability that permits two or more suppliers of services to exchange user and other information directly with each other as frequently as needed. Often the data is exchanged through defined and documented protocols called APIs. Interoperability has advantages over one-off export portability in that it allows the data sender and receiver to have an ongoing relationship and leads to faster transmission of data. It also allows the sender to observe and control the data sent to the receiver, including what, when, and how the data is sent.

7. One important effect of a platform limiting interoperability and portability is it can increase the cost of a user to switch from one platform to another (switching costs). These costs can limit the ability of a customer to substitute between competitors in a given market, potentially creating a situation of monopolistic competition where firms each have market power over a given set of customers and the ability to set prices higher than would occur without such switching costs. For example, if a consumer wanted to switch their checking account from one bank to another, they might have to spend considerable time switching their debits and credits to the new account. If switching costs are high enough, a customer may be locked-in to that supplier and unwilling to switch even though rival suppliers have lower prices or high-quality products. Hence, in this example, switching costs would make it harder for new banks to attract customers from existing banks. In general, economic theory has shown that switching costs can “*make entry more difficult and markets less competitive.*”¹¹

8. In markets where firms have business models that depend on user data, several other factors are commonly identified as being barriers to entry. These include network effects, and economies of scale and scope in user data. Interoperability and data portability can affect these different factors and hence the competitiveness of a given market.

9. Network effects occur when the value of a product or service increases with the number of people using it. There are two types of positive network effects. Direct network effects occur when the value of a product or service increases with the number of users of the same product or service. Indirect network effects occur when the value of a product or service is larger for a certain group of users when more users in a different category are using the service. Network effects can increase the cost of switching and lead to lock-in. Therefore, they can decrease the incentive for entry and innovation by potential competitors.

10. If there are economies of scale and scope in user data and the incumbent is a monopolist, entry might be foreclosed. More generally, with multiple incumbents the effects of switching costs can be more complex, but entry can still be deterred.¹² Interoperability and data portability can potentially allow new entrants to build sufficient scale and scope to offset the scale and scope economies of incumbent suppliers, thus reducing the potential barriers to entry.¹³ For example, rival search engines to Google have suggested that Google should be required to provide click and query data to help them overcome

8 T. Wheeler, P. Verveer, and G. Kimmelman, The need for regulation of big tech beyond antitrust, *Brookings*, September 23, 2020, available at <https://www.brookings.edu/blog/techtank/2020/09/23/the-need-for-regulation-of-big-tech-beyond-antitrust/>.

9 E. Harris, Senator Klobuchar to Write Antitrust Book, *New York Times*, January 11, 2021, available at <https://www.nytimes.com/2021/01/11/books/amy-klobuchar-antitrust-book.html>.

10 C. Alter, President-Elect Joe Biden Vows to Usher in ‘a Time to Heal in America,’ *Time*, November 7, 2020, available at <https://time.com/5908983/president-elect-joe-biden-vows-to-usher-in-a-time-to-heal-in-america>.

11 M. Motto, *Competitive Policy: Theory and Practice* (Cambridge University Press, 2004), p. 81.

12 J. Farrell and P. Klemperer, Coordination and Lock-In: Competition with Switching Costs and Network Effects, in *Handbook of Industrial Organization*, Vol. III, M. Armstrong and R. H. Porter, eds. (Amsterdam: North-Holland Publishing, 2007), pp. 1967–2072.

13 G. Nicholas, Taking It With You: Platform Barriers to Entry and the Limits of Data Portability, Working Paper, March 2020, pp. 12–13 (hereafter “Nicholas 2020”).

Google’s scale advantages.¹⁴ Although some earlier studies had indicated there were little or no economies of scale or scope in search, more recent research has shown that there can be economies of scale to user data in internet search. In particular, data on a consumer’s previous searches improves the quality of search results—although other factors, such as the quality of the artificial intelligence algorithms are also important.¹⁵ Whether there are economies of scale and scope in user data will be specific to a given platform and set of markets.

11. By reducing consumer lock-in, data portability and interoperability can create incentives for entry and greater competition within the market. In some circumstances, they can also reduce the profitability of incumbent firms, which may weaken those firms’ incentives to innovate and differentiate their products and services. For example, in some markets, such as internet search, there may be economies of scale and scope in user data. Allowing greater data portability may reduce the barriers to entry in that market and could lead to increased competition; however it could also reduce the profitability of incumbent firms, which could lead to reduced investment in new product development.

12. The balancing of pro- and anti-competitive effects in situations with limited interoperability and data portability is likely to vary across markets and individual platforms. As such, the American Bar Association Antitrust Law Section “*recommends a fact-specific, case-by-case approach to allegations of monopoly leveraging and lock-in*” when evaluating the competition and digital economy.¹⁶

II. Interoperability issues

13. While defined differently by different authors and entities, interoperability can be defined as the “*ability to transfer and render useful data and other information across systems, applications, or components.*”¹⁷ Interoper-

ability can be horizontal, connecting competing services, or vertical, connecting complementary services.¹⁸ Interoperability can be present or absent to varying degrees in systems, and is influenced by both technology and contractual/legal considerations.¹⁹ Benefits of interoperability include lower transactions and informational costs, boosts to innovation and competition (specifically to complementary products), greater consumer choice and access, and lower switching costs.²⁰ However, interoperability also comes with potential costs, including greater homogeneity and reduced innovation/competition if uniform standards limit the development of products and services.²¹

14. Firms choose their market positioning regarding their offerings’ degree of interoperability, and customers may choose offerings that are more open and flexible or more closed and potentially perceived as less risky regarding reliability or security.²² In efficient markets, choices over the degree of interoperability should not result in a market failure.²³ However, in situations in which a dominant firm exists or will exist due to conditions favoring a natural monopoly, competition may not generate technological standards/interoperability efficiently.²⁴ While collective standard-setting has been heavily and successfully used, studies indicate that it is not always optimal if, for example, first-mover advantages combined with network effects can “lock in” an inefficient standard.²⁵

15. These economic considerations have been applied to the large tech companies. For example, in its discussion of Facebook, the House Report highlighted how users spend “*significant time building their networks on Facebook*” while also noting that “[o]ther social network platforms are not interoperable with Facebook.”²⁶ The Report found that this leads to a “locking in” of users on the Facebook platform, and the House Report notes that Facebook employees recognize how “*high switching costs insulate Facebook from competition.*”²⁷ Facebook users have a limited ability to download their data, in limited formats, but the House Report concluded that “*users seldom leave Facebook due to the challenges of migrating their data.*”²⁸

14 Online Platforms and Digital Advertising, Market Study Interim report, CMA, 2019, para. 6.65, available at https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim_report.pdf.

15 See M. Schaefer, G. Sapi, and S. Lorincz, The Effect of Big Data on Recommendation Quality. The Example of Internet Search, *Düsseldorf Institute for Competition Economics (DICE) Discussion paper*, No. 284, April 2018. For a summary of the earlier research, see C. Tucker, Digital Data, Platforms and the Usual [Antitrust] Suspects: Network Effects, Switching Costs, and Essential Facility, *Review of Industrial Organization* 54, No. 4 (2019), pp. 683–694.

16 Report of the International Developments Comments Task Force on Positions Expressed by the ABA Antitrust Law Section between 2017 and 2019, Common Issues Relating to the Digital Economy and Competition, February 27, 2020, p. 36, available at https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/lp-files/sal-report-on-common-issues-relating-to-the-digital-economy-and-competition-final-4162020.pdf.

17 W. Kerber and H. Schweitzer, Interoperability in the Digital Economy, *Journal of Intellectual Property, Information Technology and E-Commerce Law (JIPITEC)* 8 (1) 2017, available at <https://www.jipitec.eu/issues/jipitec-8-1-2017/4531>, Section 2.1, citing J. Palfrey and U. Gasser, *Interop: The Promise and Perils of Highly Interconnected Systems* (Basic Books, 2012), p. 5, and the Standard Glossary of Software Engineering Terminology (IEEE 610).

18 Kerber and Schweitzer, *supra* note 17, Section 2.1.

19 *Ibid.*

20 *Ibid.*, Section 2.2.

21 *Ibid.*

22 *Ibid.*, Section 2.3.

23 *Ibid.*

24 *Ibid.*, Section 2.3 and Section 5.

25 *Ibid.*, Section 2.3 and Section 3.

26 House Report, p. 144.

27 *Ibid.*, p. 145.

28 *Ibid.* The House Report cites a UK Competition and Markets Authority (CMA) finding that Facebook derives market power from, “*strong network effects stemming from its large network of connected users and the limited interoperability it allows to other social media platforms*” (p. 134, citing CMA, Online Platforms and Digital Advertising, Market Study Final Report, 2020).

16. Both the FTC and State Attorney General complaints against Facebook cite interoperability related issues as part of Facebook's alleged anticompetitive conduct, though the complaints appear to place more emphasis on anticompetitive acquisitions of potential competitors. Specifically, the complaints discuss Facebook's use of APIs by which third-party apps can access Facebook user data. The complaints note that Facebook initially encouraged software developers to build apps and tools that would interoperate with Facebook and increase Facebook's platform dominance.²⁹ However, Facebook then changed its policy to only allow access to the APIs if third-party apps did not compete with Facebook's features or promote Facebook's competitors.³⁰ The complaints provide many examples of restricting apps' access to the APIs (i.e., removing interoperability) in instances where Facebook allegedly identified that apps were potential competitive threats to Facebook.³¹ The complaints allege that Facebook's policies and restrictions suppressed competition by incenting software developers not to compete with Facebook and hindering potential competitors that do emerge.³² In addition to these actions against Facebook, recent antitrust complaints against Google claim its search engine's lack of interoperability with Microsoft's Bing substantially contributes to a reduction in competition.³³

III. Data portability issues

17. Data portability can reduce consumer switching costs and, hence, make entrants' products closer substitutes for incumbent suppliers' products that can lead to greater competition and lower prices. For example, under one-off export portability, such as that required by the European Union's (EU) General Data Protection Regulation (GDPR), consumers can download their personal data from a supplier or digital platform and transfer it to another supplier. Interoperability reduces switching costs even more than one-off data export because data can be transferred more rapidly and with greater flexibility.

18. Data portability has been used to address the potential competitive effects of increased market power. In the 2010 *Ticketmaster/Live Nation* merger, the US Department of Justice required that the parties agree to a data portability provision such that customers who did not

want to renew their contracts with the merging parties could request their historical data on buyer and client ticketing purchases.³⁴

19. Data portability can reduce lock-in caused by network effects. Reductions in switching costs because of data portability can make competing networks more attractive to users even with substantial network effects and lead to consumer switching or use of multiple platforms (multi-homing). Low switching costs and multi-homing may allow the rival supplier to quickly build a large base of users and take advantage of network effects. For products and services that are substitutes, this can create incentives for competing suppliers to enter and invest in product quality. However, it can also reduce the profitability of incumbent suppliers and their incentives to innovate. For complementary products to an incumbent network, the reduction in switching costs can increase output and profits for both networks. For example, Zynga used Facebook APIs to develop a successful gaming platform for Facebook users, which accounted for a significant portion of Facebook's revenues in its early years.³⁵ For two-sided platforms, the effects of reductions in switching costs on users of one side of a platform may be different than the effects on users of the other side of the platform. Thus, whether data portability will enhance competition will be dependent on facts specific to a given market. The effects of data portability on competition may also depend on the degree to which the users are allowed to move their data in a coordinated fashion and platform interoperability. For example, with social network platforms, such as Facebook, a user who exports only their data to another social network platform loses the benefits from posts and messages from their contacts on Facebook. This increases the costs of switching to a competing network. Conversely, if a platform allowed groups of users to migrate to another platform that could increase the attractiveness of competing platforms and increase the incentives for entry.

20. Consumer lock-in may also arise when user data is used to improve products that are tailored to them and the data is not portable across platforms.³⁶ These improvements can result in both economies of scale and scope. Economies of scale can occur because having more experience data for a given user as well as data for more customers may allow a platform to better train the artificial intelligence algorithms that produce its services.³⁷ Economies of scope can occur because a firm active in multiple markets can build a richer model of consumer behavior and its uses, such as selling a larger variety of products. For example, Google may be able

²⁹ FTC Complaint, paras. 129–131; State Attorney General Complaint, para. 79–82, 188–198.

³⁰ FTC Complaint, paras. 23, 136–149; State Attorney General Complaint, paras. 199–205.

³¹ FTC Complaint, paras. 152–158; State Attorney General Complaint, paras. 133, 206–229.

³² FTC Complaint, paras. 25–26, 137, 150–152; State Attorney General Complaint, paras. 14–15, 230–231.

³³ See, for example, *State of Colorado et al. v. Google, In the United States District Court for the District of Columbia*, Complaint, December 17, 2020, available at <https://coag.gov/app/uploads/2020/12/Colorado-et-al.-v.-Google-PUBLIC-REDACTED-Complaint.pdf>.

³⁴ See *United States et al. v. Ticketmaster Entertainment Inc. and Live Nation Inc.*, Final Judgment, July 30, 2010.

³⁵ In 2011, Zynga accounted for 19% of Facebook's revenues. See Nicholas 2020.

³⁶ M. L. Katz, Multisided Platforms, Big Data, and a Little Antitrust Policy, *Review of Industrial Organization* 54, No. 4 (2019), p. 697.

³⁷ This point was noted by the U.S. Department of Justice in the *Microsoft-Yahoo* case: "[A]ccess to a larger set of queries [by different users] should accelerate the automated learning of Microsoft's [search] algorithms." See M. Gal and D. Rubinfeld, Data Standardization, *NYU Law and Economics Research Paper* No. 19-17, June 2019, p. 19.

to use information about a consumer's Google email, YouTube selections, geo-location, and browser history to better target product advertising or content sites for that consumer.

21. The change in data portability regulations that has been studied the most is the effects of mobile number portability (MNP) on consumer prices for cellphone service. Prior to MNP, consumers faced significant costs of switching telephone carriers, because they had to change phone numbers when they switched carriers. After MNP was introduced, a consumer could keep their mobile phone number regardless of whether it switched carriers. Studies of MNP adoption have generally found that consumer prices on average declined, anywhere from 4.2% to 12% depending on the study and methodology.³⁸ However, there are differences between number portability and data portability that may limit its applicability to other situations, such as the nature of the data that is exported (static telephone number versus digital data) and network effects.

22. There do not appear to have been any empirical studies of the effects of data portability on innovation. However, Wohlfarth (2017) has a game-theoretic model of the effects of data portability on innovation.³⁹ He finds that data portability increases innovation by enhancing the profitability of new services. However, it also creates incentives for firms to collect more data from users, which in his model decreases consumer surplus -- although total surplus increases due to greater product variety.

IV. Biden administration's options

23. It would not be surprising if the Biden administration considered taking a stronger position on interoperability and data portability than addressed in the complaints against Facebook and Google. The House Report also finds that Google is “[i]nhibiting interoperability between Google's ad platforms and non-Google ad platforms.”⁴⁰

24. Interoperability issues can extend beyond digital search and social media platforms. The House Report mentions that interoperability is also a challenge across dominant cloud infrastructure, and cited Snap's investor statement discussing how “transition of the cloud services

currently provided by either Google Cloud or AWS to the other platform or to another cloud provider would be difficult to implement and will cause us to incur significant time and expense.”⁴¹ Further, the House Report finds: “Through a combination of self-preferencing, misappropriation, and degradation of interoperability, Amazon has sought to eliminate cross-platform products with Amazon-only products.”⁴² The House Report also highlights how Apple has “limit[ed] interoperability by restricting how digital voice assistants work on Apple devices,”⁴³ and sellers may be locked into a platform if unable to transfer their reputation to another platform.⁴⁴

25. Assuming the Biden administration decides to follow up on these concerns, what path will it take to correct any perceived harms to competition? *The Economist* magazine has argued that “Without new legislation, it will be hard to do much about the rising concentration of business or big tech companies, given the courts are reluctant to take action.”⁴⁵ Recognizing the difficulties that can occur in winning an antitrust case and fashioning a remedy for ensuring interoperability and portability, one option for the Biden administration could be to create new regulations to address these issues. Such regulation in itself can be difficult and time-consuming to create and implement without creating incentives that would damage, rather than facilitate, competition. Moreover, such regulations could take the form of a “one shoe fits all” approach, when balancing the economic considerations indicates more of a case-by-case approach.

26. For example, Kerber and Schweitzer state: “In view of the potential cost of mandated interoperability with regard to the path of innovation, a strict proportionality principle should apply. Before mandating access, policy makers, regulatory and competition authorities should strive to support decentralized bottom-up interoperability solutions wherever possible. The EU Commission has started to look for such strategies: user rights to portability of content and/or data may significantly reduce switching cost in a non-interoperable environment. Also, more attention should be given to defining the preconditions under which the pro-active unilateral obstruction of a decentralized search for adapters or converters by a dominant firm may constitute an abuse.”⁴⁶

27. Others have more ardently supported the need for more mandated interoperability to solve market power issues regarding tech giants. Kades and Scott Morton argue: “Mandatory interoperability based on robust and effective rules could overcome the network effects that protect the incumbent from entry, maximizing the potential

38 For example, one study of MNP in 38 countries found that average rates declined by between 6.6% and 12% depending on the methodology (S. Lyons, Measuring the Benefits of Mobile Number Portability, *Trinity Economics Papers* tep2009, 2006) Cho, Ferreira, and Telang (2016) found rates declined on average by 4.2% for 15 European countries (see D. Cho, P. Ferreira, and R. Telang, The Impact of Mobile Number Portability on Price and Consumer Welfare, Working Paper, September 29, 2016, p. 1).

39 M. Wohlfarth, Data Portability on the Internet: An Economic Analysis, Working Paper for the 28th European Regional Conference of the International Telecommunications Society, August 2, 2017.

40 House Report, p. 211.

41 *Ibid.*, p. 119, citing Snap Inc., Form 10-K for the year ending December 31, 2019, available at <http://d18rn0p25nwr6d.cloudfront.net/CIK-0001564408/0cfbe98-816e-44ae-8351-5067b4f88f0c.pdf>.

42 House Report, p. 325.

43 *Ibid.*, p. 374.

44 *Ibid.*, p. 384.

45 Joe Biden's economic plans, *The Economist*, October 3–9, 2020, at 18.

46 Kerber and Schweitzer, *supra* note 17, Section 7.

for new entrants to enter at minimal cost, compete in the market, and take share from the incumbent. This remedy could be ordered in addition to other relief such as a divestiture, and indeed could be complementary to it, or stand on its own. In today's internet-based network markets, interoperability carries no incremental costs such as dedicated wires and machines that were true of the telecom interoperability of past decades. Its main cost is the establishment of an open standard to exchange commonly used functionalities (e.g. text, images) of social networks."⁴⁷

28. The experience of other countries' efforts to deal with concerns about interoperability and data portability can provide some useful experience for the Biden administration to consider. The EU's data and privacy regulation GDPR provides for a "right to data portability."⁴⁸ The regulation gives individuals the right to receive data which they have provided to a data controller⁴⁹ "in a structured, commonly used and machine-readable format" and the right to transmit that data to another controller.⁵⁰ The regulation also provides for the right to have one's data transmitted directly from one controller to another, "where technically feasible."⁵¹ Thus, data portability is mandated by the GDPR unless it is not "technically feasible." "[T]echnically compatible" is not required, so interoperability is only encouraged.⁵² Moreover, it does not give users the right to obtain data derived by the supplier from the user's data or any non-personal data (e.g., data acquired from third parties). Karolina Mojzesowicz, the European Commission's deputy head of unit for data protection, recently stated "although GDPR has been in effect for more than two years, very few consumers have exercised their data portability rights."⁵³

29. There have been other attempts at changes in data portability regulations, such as the Current Account Switch Service (CASS) launched in September 2013 by the UK Payments Council to provide consumers with data portability of their banking transactions data and the United Kingdom's "midata" program to encourage data portability in the UK banking, energy, and mobile phone industries. Initially, these programs resulted in little switching by consumers to new providers and

limited entry by new suppliers.⁵⁴ A 2016 report on the retail banking industry in the UK concluded that older and larger banks do not have to compete as hard for customers' business, taking advantage of the fact that users rarely move their accounts.⁵⁵ As a result, the UK required banks to implement "Open Banking" by 2018, which enabled customers to share their data with other banks and third parties through APIs that the banks would develop.⁵⁶ Open banking relied on common standards for APIs, data formats, and security. Two years after the implementation, there are over 2 million active users of UK Open Banking services.⁵⁷ There are projections of the estimated benefits from data portability that suggest there could eventually be large consumer benefits. For example, the Centre for Economics and Business Research estimated that data portability could lead to a 7% reduction in the credit spread for mortgages in the UK.⁵⁸

30. On November 26, 2017, the Australian Competition & Consumer Commission (ACCC) announced the consumer data right (CDR) in Australia.⁵⁹ The CDR aimed to give greater access and control over citizens' data allowing the ability to "compare and switch between products and services." The CDR took a sectoral approach, first applying to the banking sector, then the energy sector. The banking section allows users the ability to transfer banking data to trusted parties. Full implementation of the CDR is still underway.

31. The US has already implemented some regulations dealing with interoperability and data portability, but they have also been focused on specific sectors. For example, the US Department of Health and Human Services (HHS) enacted new rules that give patients greater control over their health data. The HHS Office of the National Coordinator for Health Information Technology (ONC) identified what are "reasonable and necessary activities that do not constitute information blocking" while also establishing new rules to prevent information blocking practices, or anticompetitive behavior by

47 M. Kades and F. Scott Morton, Interoperability as a competition remedy for digital networks, September 2020, available at <https://equitablegrowth.org/working-papers/interoperability-as-a-competition-remedy-for-digital-networks>; See also, e.g., B. Cyphers and D. O'Brien, Facing Facebook: Data Portability and Interoperability Are Anti-Monopoly Medicine, *Electronic Frontier Foundation*, July 24, 2018, available at <https://www.eff.org/deeplinks/2018/07/facing-facebook-data-portability-and-interoperability-are-anti-monopoly-medicine>.

48 General Data Protection Regulation, "Right to data portability," Article 20, available at <https://gdpr-info.eu/art-20-gdpr> (hereafter, "GDPR Art. 20").

49 This could include: "history of website usage or search activities; traffic and location data; or 'raw' data processed by connected objects such as smart meters and wearable devices." Available at <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-to-data-portability>.

50 GDPR Art. 20.

51 Ibid.

52 According to GDPR Recital 68: "Data controllers should be encouraged to develop interoperable formats that enable data portability."

53 *CPI Antitrust Chronicle* November 2020, available at <https://www.ftc.gov/news-events/events-calendar/data-go-ftc-workshop-data-portability>.

54 For example, the CASS program initially resulted in a slight increase in consumer switching to new banks but over time rates of switching declined. See Y. Hartfree et al., Personal Current Account Switching: Why Don't More People Switch and What Could Encourage Them to Do So?, University of Bristol Personal Finance Centre, Working Paper, April 2016.

55 Competition & Market Authority (CMA), Retail Banking Market Investigation, Final report, August 9, 2016, available at <https://assets.publishing.service.gov.uk/media/57ac9667e5274a016c00007a/retail-banking-market-investigation-full-final-report.pdf>.

56 CMA, Press release, CMA paves the way for Open Banking revolution, August 9, 2016, available at <https://www.gov.uk/government/news/cma-paves-the-way-for-open-banking-revolution>.

57 Real demand for open banking as user numbers grow to more than two million, Open Banking, September 28, 2020, <https://www.openbanking.org.uk/about-us/latest-news/real-demand-for-open-banking-as-user-numbers-grow-to-more-than-two-million>.

58 See Organisation for Economic Co-operation and Development (OECD), Consumer Data Rights and Competition – Background Note, June 2020, p. 44, available at [https://one.oecd.org/document/DAF/COMP\(2020\)1/en/pdf](https://one.oecd.org/document/DAF/COMP(2020)1/en/pdf).

59 Australian Competition & Consumer Commission (ACCC), Consumer Data Right, available at <https://www.accc.gov.au/focus-areas/consumer-data-right-cdr-0>.

healthcare providers.⁶⁰ The ONCs rule also advanced common data through the US Core Data for Interoperability, which seeks a “*standardized set of health data classes and data elements that are essential for nationwide, interoperable health information exchange.*” Additionally, API requirements to support patients’ access and control of their electronic health information were established.

32. On September 22, 2020, the FTC hosted a public workshop to examine the potential benefits and challenges to consumers and competition raised by data portability.⁶¹ A key lesson about data portability that emerged from the workshop is that data portability is not a cure-all for addressing anticompetitive behavior.⁶² Participants found that data portability laws and regulations will prevent user lock-in on particular platforms, but would not significantly impact competition because users would not want to leave a service that is ubiquitous and from which users gain value.⁶³

33. The participants compared general and sectoral approaches to data portability. Sectoral approaches would target individual industries such as banking, whereas more general approaches, like GDPR, would provide a wider scope for data portability standards. Participants noted, “*one disadvantage to a sectoral approach is that it makes it more difficult to transfer data across different markets, such as in the context of the Internet of Things.*”⁶⁴ However, participants stated that a sectoral approach may be a better starting point because of the ability to “*be more concrete in standard setting and infrastructure design,*” making a future general approach to data portability “*more effective because the portability infrastructure already will have been created.*”⁶⁵

34. The US has previously considered broad regulation of interoperability and data portability but did not enact regulations even though there was some support from both Democrats and Republicans. The Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act was introduced in the US Senate in 2019 as bipartisan legislation that would encourage competition on social media platforms by requiring companies to make user data portable and their

services interoperable.⁶⁶ User data was defined in the Act as any information directly collected by the provider or linked to a specific person. The provider would have been required to maintain a transparent set of third-party accessible interfaces, including APIs. It also provided for the setting of reasonable thresholds, access standards, and fees. The act aimed to remove “*artificial barriers to entry*” allowing users to switch between platforms giving startups a chance to “*compete on equal terms with the biggest social media companies.*”⁶⁷ The senators identified network effects and consumer lock-in as key issues which allowed a select number of companies’ dominance in the market to enhance by their control over consumer data.

35. The Biden administration may revisit the issues raised in the ACCESS Act. The House Report found implementing interoperability would not be costly for dominant platforms, and in allowing users to communicate across platforms, it would lower switching costs and allow new entrants to “*take advantage of existing network effects ‘at the level of the market, not the level of the company.’*”⁶⁸ The House Report also concluded that interoperability is “*an important complement, not substitute, to vigorous antitrust enforcement,*” and that “[d]ata portability is also a remedy for high costs associated with leaving a dominant platform.”⁶⁹ As a result, “*Subcommittee staff recommends that Congress consider data interoperability and portability to encourage competition by lowering entry barriers for competitors and switching costs for consumers. These reforms would complement vigorous antitrust enforcement by spurring competitive entry.*”⁷⁰ The House Report cited public support in this area, noting a Consumer Reports survey finding that “*60% [of Americans] support more government regulation of online platforms, including mandatory interoperability features, to make it easier for users to switch from one platform to another without losing important data or connections.*”⁷¹ Overall, one of the primary recommendations of the House Report related to “[i]nteroperability and data portability, requiring dominant platforms to make their services compatible with various networks and to make content and information easily portable between them.”⁷²

60 U.S. Department of Health and Human Services (HHS), HHS Finalizes Historic Rules to Provide Patients More Control of Their Health Data, March 9, 2020, available at <https://www.hhs.gov/about/news/2020/03/09/hhs-finalizes-historic-rules-to-provide-patients-more-control-of-their-health-data.html>.

61 Federal Trade Commission (FTC), Data To Go: An FTC Workshop on Data Portability, September 22, 2020, <https://www.ftc.gov/news-events/events-calendar/data-go-ftc-workshop-data-portability>.

62 H. Omaar, 5 Key Takeaways From the FTC Workshop on Data Portability, Center for Data Innovation, November 14, 2020, <https://datainnovation.org/2020/11/5-key-takeaways-from-the-ftc-workshop-on-data-portability>.

63 Ibid.

64 G. Roschke and A. Zach, Data to Go: The FTC’s Workshop on Data Portability, *CPI Antitrust Chronicle*, November 2020, available at: https://www.ftc.gov/system/files/documents/public_events/1568699/data-portability-workshop-summary.pdf.

65 Ibid.

66 Senators Introduce Bipartisan Bill to Encourage Competition in Social Media, Mark R. Warner, U.S. Senator from the Commonwealth of Virginia, October 22, 2019, available at <https://www.warner.senate.gov/public/index.cfm/2019/10/senators-introduce-bipartisan-bill-to-encourage-competition-in-social-media>.

67 Ibid.

68 House Report, p. 385, citing M. Kades and F. Scott Morton, Interoperability as a Competition Remedy for Digital Networks, September 2020, pp. 13–14.

69 House Report, p. 386. However, “*data portability alone would not fully address concerns related to network effects since consumers would still need to recreate their networks on a new platform and would not be able to communicate with their network on the incumbent platform*” (ibid.).

70 Ibid., p. 384.

71 Ibid., p. 12, citing Consumer Reports, Platform Perceptions: Consumer Attitudes on Competition and Fairness in Online Platforms, 2020, available at <https://advocacy.consumerreports.org/wp-content/uploads/2020/09/FINAL-CR-survey-report-platform-perceptions-consumer-attitudes-september-2020.pdf>.

72 House Report, p. 20.

36. In sum, it is likely that the Biden administration will continue with antitrust cases against the large tech platforms, which include allegations of preventing interoperability and data portability. The Biden administration may also attempt to impose direct regulation on interoperability and data portability. If so, it will need to decide whether to focus on targeted sectors of the economy such as certain digital platforms or take a broader approach that encompasses many industries. ■

Biden administration antitrust

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1. In the first decades after passage of the Sherman Act, courts were forced to grapple with how the law's brief and vague prohibitions—on restraints of trade and monopolization—applied to specific forms of business conduct. By 1914, when the Clayton Act and FTC Act became law, the Supreme Court had settled on the rule of reason as the default approach to assessment of competitive effect, while the *per se* rule was reserved for horizontal restraints lacking any procompetitive potential, and vertical price-fixing. Thirty years later, spurred by New Deal acolytes at the federal agencies and in the federal courts—Robert Jackson, Thurman Arnold, Louis Brandeis and William O. Douglas—U.S. antitrust enforcement began a determined shift toward comprehensive use of *per se* rules. From about 1943 until 1973, horizontal restrictions, vertical restrictions, and intellectual property licensing restrictions were all shoved into the furnace of summary condemnation. Although the term “*per se*” was never applied to structural transactions, adoption of rigid structural presumptions and condemnation of transactions lacking competitive significance led to Justice Stewart's famous recognition of the reality (*United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (dissenting opinion)) that “the Government always wins” in merger cases. Similarly, although the term “*per se*” was never applied to monopolization claims, cases such as *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945), and *United Shoe Machinery Corp. v. United States*, 347 U.S. 521 (1954), placed the burden squarely upon any monopolist to prove that its market power had been “thrust upon” it, even when the monopolist's behavior had been “honestly industrial.” The force of this trend was perhaps most powerfully reflected in *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972), in which the court affirmed the *per se* rule and openly mocked the idea that economic analysis could be used to defend non-price restraints ancillary to a legitimate joint venture.

2. Pervasive antitrust hostility toward business conduct and the disregard of economics had real-world consequences. By the early 1970s, the U.S. economy had drifted into a prolonged period of “stagflation”—low growth with high inflation and unemployment. Key U.S. industries—automobiles, consumer electronic products, machine tools—were ceding market leadership to Asian and European competitors. The “Nixon Shock” of 1971—termination of dollar-gold convertibility, imposition of wage and price controls and a 10% surcharge

on all imports—both confirmed and exacerbated the nation's historic economic downturn. By the time of the Carter–Reagan transition in 1981, unemployment, interest and inflation rates were all well into double digits.

3. Fortunately, the federal government responded to these worrisome developments, and a thorough-going reassessment of U.S. economic policy occurred in many spheres, including antitrust and sectoral regulation. In 1974 the Supreme Court first softened its resistance to economic arguments in antitrust cases. In *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), the court accepted an economic deconstruction of concentration data offered by the Antitrust Division, concluding that such data was flawed and therefore would not support yet another merger prohibition based on mere structural presumption. More significantly, in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the court not only removed non-price vertical restraints from the *per se* category, but reversed *Topco's* hostility to economic analysis, stating, “departure from the rule-of-reason standard must be based upon demonstrable economic effect, rather than -- as in [*United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)] -- upon formalistic line drawing” (*id.*, at 58–59).

4. In the decades following *Sylvania*, encouraged by trends in scholarship and supported by the increasing quality of antitrust economics, the scourge of *per se* condemnation was lifted from most forms of competitive conduct outside the category of horizontal restraints lacking competitive merit. Structural market characteristics were gradually deemphasized in merger analysis (and otherwise), culminating in the 2010 Horizontal Merger Guidelines, in which both Obama administration antitrust agencies joined in relegating concentration to the role of a preliminary indicator of competitive effects. The dominant role of innovation in producing economic progress was clearly recognized, such that standards for monopolization and business conduct involving intellectual property prominently incorporated sensitivity to the maxim (coined in his 1945 *Alcoa* decision by progressive guru Judge Learned Hand) that “the successful competitor, having been urged to compete, must not be turned upon when he wins.”¹ By 2007 all vertical

¹ *Alcoa, supra*, 148 F.2d at 430.

restraints (except certain instances of tying) were back in the rule of reason category. In the meantime, Congress liberated numerous economic sectors from rigid administrative-agency controls; the Interstate Commerce Commission and the Civil Aeronautics Board were abolished, and the regulatory interventions of the Federal Communications Commission and Federal Energy Regulatory Commission were more closely limited to industry sectors where regulation could be justified due to pervasive and serious market failures. Where bureaucratic control was withdrawn, competition subject to antitrust became the dominant limitation on firm behavior in the affected sectors.

5. The enhanced success and popularity of free-enterprise competition subject to economically enlightened antitrust principles received additional support from a variety of events in the decades following *Sylvania*. Although antitrust limits on business conduct had been ameliorated by the restoration of the rule of reason, powerful enforcement initiatives continued. While broad structural attacks on particular industries—ready-to-eat breakfast cereal, vertically integrated petroleum companies, titanium dioxide and the gasoline additive ethyl, general-purpose computers—were rejected by courts or abandoned as their legal and economic foundations came into question, a Justice Department monopolization case initiated in 1974 resulted in the dissolution of the world’s single largest private enterprise (the Bell System) pursuant to an antitrust consent decree entered in 1982. Several monopolization lawsuits against Microsoft Corp. also resulted in consent decrees limiting the software company’s competitive conduct. Three major developments in the 1980s and early 1990s led to the global proliferation of antitrust law and significantly enhanced enforcement worldwide. First, the economic collapse of the Soviet Union resulted in its political dissolution in 1991, ending the global Communist movement and removing the main source of dogmatic opposition to free private markets as a system of organizing productive activity. Second, the European Communities undertook a broad scheme of expansion and strengthening, resulting in the creation of the European Union and the substantial expansion of its membership to include a newly unified Germany and many former Soviet satellite nations, among others. Each EU Member State was required to adopt and enforce competition laws consistent with those of the EU. With encouragement from the leading antitrust jurisdictions and public international organizations (World Bank, International Monetary Fund, OECD), antitrust regimes emerged in scores of new jurisdictions throughout the world. Third, in 1994 the U.S. hit upon a leniency program that substantially enhanced the effectiveness of cartel enforcement, not only increasing the frequency and severity of U.S. penalties applied to such conduct, but also serving as a model for the rapidly expanding list of jurisdictions outside the U.S. who were joining the international enforcement community.

6. Facilitated in part by these post-*Sylvania* developments, the U.S. became the envy of the world for its pace of innovation, as the personal computer, the internet, cellular and other wireless communication,

packet switching, smartphones and many thousands of new software applications led to a huge expansion of digital products and services, resulting in the creation and profound transformation of many economic sectors and social activities. Firms started by college dropouts (Facebook), small groups of grad students (Google) or lone entrepreneurs (Amazon) introduced novel products and services and quickly evolved to become the largest commercial enterprises in history. Although Apple dates to the relatively ancient days before the internet, it had to be rescued from the edge of bankruptcy in 1997 by rehiring its exiled founder Steve Jobs. Thanks to Apple’s relentless innovation that created revolutionary devices and services such as the smartphone, app store and tablet computer, barely twenty years later Apple now stands as the most valuable private business firm in world history (two trillion USD at this writing).

7. Given these historic economic and technical achievements, the consensus U.S. approach to antitrust that has prevailed since the time of *General Dynamics* and *Sylvania* deserves a victory lap. Paradoxically, however, the long-standing and solid consensus in favor of the post-*Sylvania* approach to antitrust now finds itself subject to hostile challenge on several fronts. Toward the end of the Obama administration, a Report of the Council of Economic Advisers² suggested that U.S. competition was in decline. In June 2019 the House Judiciary Committee began an “Investigation of Competition in Digital Markets,” which resulted (inter alia) in the issuance of a Majority Staff Report and Recommendations (“MSRR”) on October 6, 2020.³ Although the Committee took no official action on any of the MSRR’s long list of specific legislative proposals, the MSRR is essentially a Cassandra-style assessment of the present state of U.S. competition policy, bemoaning the allegedly weak and declining state of U.S. competition, attributing this to unsound judicial reasoning and failures of prosecutorial conviction at the federal antitrust agencies, and concluding with a long list of suggestions for action that would essentially return U.S. antitrust enforcement to its pre-1974 status, with heavy use of per se rules, structural presumptions, and a long list of specific prohibitions on the activities of the digital technology leaders (e.g., structural separation of distinct platform activities, line-of-business restrictions). Unsurprisingly, the thrust of the MSRR was echoed by a Democrat think tank report authored by veterans of the Clinton and Obama administration antitrust agencies. The latter report, *Restoring Competition in the United States: A Vision for Antitrust Enforcement for the Next Administration and Congress*,⁴ begins with the bold but unsupported and largely immaterial assertion that, “Excessive market power plagues the U.S. economy.” (Unsupported because the analysis cited is notably

2 Council of Economic Advisers, *Benefits of Competition and Indicators of Market Power* (April 2016), available at: https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

3 https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

4 <https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states/?longform=true#footnote-1>.

unpersuasive, and because whether such power is “excessive” can only be judged in relation to the competitive merits of the underlying conduct. Immaterial because market power resulting from breakthrough innovation that meets immense competitive success based on rapid and widespread consumer acceptance should not be reprehended under any responsible understanding of sound antitrust doctrine.) Broadly speaking, “Restoring Competition” echoes the analysis and many of the prescribed remedies offered by the MSRR.

8. The antitrust record of the Biden administration should be judged primarily on the strength and success of its resistance to the unsupported analysis and generally inappropriate recommendations of these two reports. Given the obvious current tension between radical and moderate elements of the Democrat Party, it is anyone’s guess as to how the White House will perceive and deal with these proposals to reject the unmistakable lessons of more than a century of antitrust enforcement history.

The most promising course would be for the incoming administration to make agency leadership appointments and adopt policies reinforcing the clear and basic lessons of the ill-starred mid-century experiment (1943–1973) with structural presumptions, per se rules and willful ignorance of economic analysis. The worst-case scenario would be for the administration to create—by act or omission—any opening for a return to the primitive antitrust aggression that grew out of the New Deal. Finally, the Biden administration should recognize that many elements of the discredited formalistic antitrust approaches of the mid-20th century U.S. are now being promoted by antitrust authorities around the world. To ensure the integrity and success of the legal and regulatory environment for continuing U.S. innovation leadership, the Biden administration should encourage and assist foreign antitrust regimes in avoiding the same misguided enforcement instincts that overcame the U.S. antitrust system during the days of the per se/structuralist craze. ■

Will the Biden presidency forge a digital transatlantic alliance on antitrust?

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1. After the Trump era and in the midst of the Covid-19 pandemic, the Biden presidency will inherit a country that—as the recent riot on the US Capitol building harshly demonstrated—is politically divided, weakening and, most importantly and consequently, in danger of losing its global leadership to China.

2. Indeed, the international community expects the Biden administration to re-establish the USA's political and economic global leadership, especially in international fora such as the World Health Organization or the Paris Climate Agreement, as it did after the Second World War.

3. The pillars of Biden's foreign policy can be summed up by three Ds: Domestic, Deterrence and Democracy.¹ As to the first, in order to revive the US economy and catch up on high technology, Biden's policy cannot deviate much from that of Trump's "America First." Thus, massive investment is also expected in infrastructure, innovation, technology and education.

4. At the same time, US foreign policy will be guided by the principle of deterrence which characterized the Cold War period. This policy will have to be adapted to the new context and, especially, to the strategies adopted by the United States' main counterparts such as China, Russia, North Korea and Iran, which no longer rely on missiles but on the information and communication technologies (ICTs).

5. Finally, the deterrence principle will catalyse the third pillar. Democracy will in fact be the main criterion for choosing US partners in order to consolidate the West against the expansion of the East.

6. Within this context, the digital economy represents an extremely important battlefield for the US to regain

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world leadership. The USA is well placed when it comes to digital competition—indeed, almost all the prominent Western online platforms are American.

7. However, over the last decade, Google, Amazon, Facebook, Apple and Microsoft (hereinafter "GAFAM") have come under severe antitrust and regulatory scrutiny, starting in the European Union and ending in the United States. A "break-up" sentiment is spreading on both sides of the Atlantic and this will certainly represent one of the main issues on Biden's agenda. Indeed, GAFAM's huge market power is perceived as a threat to Western democracies and has been accused of hampering competition and innovation. Both the USA and the EU know that it is fundamental to shape global standards in order to face security and privacy concerns posed by the rise of Eastern tech giants.² Moreover, there is a growing feeling that the growth of big tech, combined with non-democratic governments, could lead to "techno-authoritarianism."³

8. Therefore, will there be a transatlantic unity when clamping down on online giants in the name of protecting and strengthening Western "techno-democracies?" A digital transatlantic alliance shall not be taken for granted.

9. Indeed, over the last decade, the EU has markedly shaped its own way of building a European data market and of facilitating the emergence of European tech companies.

10. The White Paper on Artificial Intelligence and the Communication on data strategy have made it clear that the EU has put its own digital infrastructure and assets in place, catching up with international competition in order to become one of the leaders in the digital realm. This

*The opinions expressed by the authors are personal and do not necessarily reflect the position of the Italian Competition Authority.

1 L'America di Biden e il mondo: ritorno alla leadership, Commentary, *ISPI*, 7 November 2020.

2 Biden has a chance to revive America's alliances: EU and Asian allies are keen to embark on new era of co-operation, *Financial Times*, 28 December 2020.

3 Y. N. Harari, *21 Lessons for the 21st Century* (Random House, 2018); M. Dassù, L'Europa alla prova di Biden, *La Repubblica*, 30 November 2020.

aim is the result of a long stream of actions which started in the second half of the 1990s with the need to tackle more specific and disparate needs, such as guaranteeing that consumer data is processed fairly, lawfully and with a specific purpose⁴; providing legal protection to databases, such as copyright protection and *sui generis* rights.⁵

11. Furthermore, at the beginning of the new century, the European Union issued the e-Commerce Directive⁶ with the aim of removing obstacles to cross-border online services in the EU. Indeed, since 2010, there has been a significant change of pace; due to the evolution of the digital paradigm, the European Union started to adopt a more strategic view. In that year, the European Commission launched its Digital Agenda, which, among other things, gave birth to the creation of a Digital Single Market that aimed primarily to promote e-commerce within the EU.

12. In 2015, the EU made it clear that the EU Digital Single Market was a priority and released a new strategy aiming at improving access to digital goods and services, building an environment where online networks and services could prosper, exploiting it as a driver for growth.

13. A well-functioning and dynamic data economy requires the flow of data in the internal market to be enabled and protected. This is why the European Union issued the 2016 General Data Protection Regulation and developed the “European data economy strategy.” Through the latter, the European Commission proposed a series of policies and legislative initiatives to unlock the potential for re-use of different types of data and create a common European data space. In particular, it adopted the measures put forward in the European Commission’s 2018 communication Towards a common European data space, in which it proposed: (i) a review of the Directive on the re-use of public sector information (PSI Directive); (ii) an update of the 2012 Recommendation on access to and preservation of scientific information; (iii) guidance on sharing private sector data in B2B and B2G contexts. A new EU Regulation on the free flow of non-personal data was also adopted.

14. Moreover, in 2019, in order to foster the growth of the EU Digital Single Market, the European Union published another regulation in order to promote fairness and transparency for business users of online intermediation services.⁷

15. The long European legislative excursus described above concluded with the latest new regulatory package published by the European Commission at the end of 2020. The package included the Data Governance Act (DGA),⁸ the Digital Services Act (DSA)⁹ and the Digital Markets Act (DMA).¹⁰ Regarding the former, the European Commission aims to provide a legal framework in order to unlock unused data, increase data accessibility and share data. The DSA builds on the e-Commerce Directive and provides a set of rules for digital service providers in order to guarantee transparency and accountability and advocates for effective obligations to tackle illegal content online. As for the DMA, it is the result of a decade of EU antitrust public enforcement and EU studies on the digital economy.

16. Indeed, the European Commission has launched several cases against online giants. Suffice it now to mention the Google saga (i.e., *Google Shopping*, *Android* and *AdSense* cases) and the ongoing *Amazon* ones. These lawsuits were all abuses of dominant positions characterized mainly by self-preferencing conducts. Despite the high sanctions imposed, the *Google* cases were criticized because of the lengthy and complex investigations and ineffective remedies imposed.¹¹

17. This contributed to fuelling scepticism that competition law alone would not be sufficient to restore competition within digital markets.¹² As a matter of fact, the European Commission issued the DMA in order to restore contestability and fair play in EU digital markets.

18. In a nutshell, the DMA identifies a list of “core platform services” which are characterized, among other things, by extreme economies of scale, strong network and lock-in effects, almost zero marginal costs and lack of multi-homing. For instance, online search engines and social networking services can be considered core platform services.

19. The DMA defines “gatekeepers” as large online platforms which provide these kinds of services and/or intermediation position, which is entrenched and durable, gatekeepers must comply with a list of “dos” and “don’ts.” For instance, gatekeepers shall “*allow third parties to inter-operate with the gatekeeper’s own services in certain specific situations*” and “*their business users to access the data that they generate in their use of the gatekeeper’s platform.*” If the gatekeepers do not comply

4 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, pp. 31–50. Which was complemented by the 2002 Directive on Privacy and Electronic Communication. The last one was then amended in 2006 and in 2009.

5 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, pp. 20–28.

6 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17.7.2000, pp. 1–16.

7 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, pp. 57–79.

8 European Commission, Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act), COM(2020) 767 final, 25 November 2020.

9 European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final, 15 December 2020.

10 European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, 15 December 2020.

11 S. Vezzoso, *Android Remedies: Tearing Down the Wall?*, *CPI*, November 2018.

12 G. Salerno Aletta, “Chi fa la guerra ai monopoli?”, *Milano Finanza*, 19 December 2020.

with these obligations, they may incur fines (up to 10% of the worldwide turnover) or periodic fines (up to 5% of the average daily turnover). In case of systematic infringement, additional remedies may be imposed. If necessary and as a last resort, non-financial penalties can be imposed, which may include behavioural and structural measures, e.g., the divestiture of (parts of) a business.

20. Thus, following these new regulations, it seems that GAFAM—who are, indeed, the main providers of core platform services in the EU digital markets—will most likely be under the European spotlight in the coming years.

21. Besides antitrust and regulations, the EU has also demonstrated its strong desire for digital independency by taking the decisive step of setting its own agenda for transatlantic cooperation, even before Biden has been sworn in.¹³ Indeed, the agenda proposes a tech alliance to shape technologies, their use and their regulatory environment. In particular, on data governance, the European Union advocates cooperation “to promote regulatory convergence and facilitate free data flow with trust on the basis of high standards and safeguards.”¹⁴ Furthermore, as for online platforms, the European Union suggests strengthening cooperation between competent authorities for antitrust enforcement in digital markets, particularly, by setting common views in market distortions. Therefore, the European Union seems to be putting itself forward as a “worldwide factory of digital rules.”¹⁵

22. However, this may not necessarily mean a strengthening of the digital industry in Europe. For instance, Europe’s financial system appears to be biased towards bank lending rather than equity capital, which should be more suitable for risky tech start-ups.¹⁶

23. Moreover, the “Brussels’ effect” should not be taken for granted either. Indeed, even if the European Union confirms its new regulatory proposal, especially the DMA, GAFAM still earn 51% of their revenues in America versus 25% in Europe. Therefore, they may most likely prefer to run their European branches under local rules instead of adopting EU rules globally.¹⁷

24. On the other side of the Atlantic, the strategy against online behemoths seems narrower and backwards-looking.¹⁸ Indeed, as we have introduced, in the USA we are witnessing a “Sherman Act momentum”¹⁹ strongly advocated by the new Brandeis movement.²⁰

25. During the Trump administration, GAFAM were scrutinized by American antitrust authorities. Indeed, the Department of Justice (DoJ) filed a civil antitrust lawsuit in the US District Court for the District of Columbia to prevent Google from unlawfully maintaining monopolies through anticompetitive and exclusionary practices in the internet searches and search advertising markets and to remedy competitive harm. Furthermore, the Federal Trade Commission (FTC) has also filed a lawsuit against Facebook accusing it of engaging in a systematic strategy to eliminate threats to its monopoly.²¹

26. In both cases, reference is made to possible “break-ups.” In particular, in the DoJ’s case, the deputy attorney general made specific reference to historic antitrust cases such as *Standard Oil* (1911) and *AT&T* (1982), and in the FTC’s case, permanent injunctions are explicitly advanced which require, inter alia, the divestiture of Facebook’s assets, including Instagram and WhatsApp.

27. Most recently, the Texas attorney general filed a lawsuit, accusing Google of entering into an unlawful agreement that gave Facebook special privileges in exchange for promising not to support a competing ad system in the online advertising markets.²²

28. “And yet it moves!” Moreover, considering the American liberal approach, it is all the more surprising to learn that, besides a more vigorous antitrust enforcement, there are growing calls for the regulation of online giants in the USA, too.

29. It is widely believed that today’s big tech’s issues are much broader than that of former monopolies such as Microsoft. Indeed, it is not only a question of commercial and market abuses, it is also about misinformation, the ability to shape public opinion, the collection and processing of massive data and how this could threaten democracies.²³

13 Already cited in full *supra* note 2.

14 High Representative of the Union for foreign affairs and security policy, Joint communication to the European Parliament, the European Council and the Council, A new EU-US agenda for global change, JOIN(2020) 22 final, 2 December 2020. An example of international cooperation is the “Common Understanding on Competition and Digital Markets” reached in July 2019 by the competition authorities of the G7 countries (Canada, France, Germany, Italy, Japan, United Kingdom, USA), together with the European Commission on the issues raised by the digital economy for competition analysis. See <https://en.agcm.it/en/media/press-releases/2019/77/G7-Antitrust-a-Common-Understanding-on-Competition-and-Digital-Markets>.

15 C. A. Carnevale Maffè, L'impero digitale colpisce ancora, *Italianeuropei*, 3/2020.

16 M. Sanbu, Regulation alone will not strengthen Europe’s digital sector, *Financial Times*, 20 December 2020.

17 America and Europe clamp down on big tech, *The Economist*, 19 December 2020.

18 *Ibid.*

19 Already cited in full *supra* note 15.

20 See the interview with Zephyr Teachout by A. Schechter, What Should the Biden Administration’s Antitrust Agenda Look Like? A Roundtable, *Promarket*, 2 December 2020.

21 W. Magnusson, The modern day trustbusters have Facebook in their sights, *Financial Times*, 18 December 2020; The Trustbusters Come for Facebook. Finally, *The New York Times*, 10 December 2020.

22 G. Edelman, Texas Accuses Google and Facebook of an Illegal Conspiracy, *Wired*, 16 December 2020.

23 S. Ovide, Microsoft’s Lessons for Google, *New York Times*, 17 December 2020.

30. Legislative proposals started with Senator Elizabeth Warren, who elaborated a break-up plan for online marketplaces in 2019.²⁴ However, the American regulatory approach may have culminated in the Cicilline report published by the Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary in 2020.²⁵ The report, which includes among its leading experts Executive Vice President Margrethe Vestager of the European Commission, sets out recommendations which “*intend (. . .) to serve as a complement to vigorous antitrust enforcement*” which are reminiscent of the DMA recently proposed by the European Commission. Only time will tell if these recommendations are converted into law, but it is widely believed that the Biden administration “*can’t afford to be as cosy with Silicon Valley as the last Democratic administration was.*”²⁶

31. However, the Biden administration will have to face fierce criticism from a section of Congress which believes that having dominant American tech firms is a strategic advantage in the tough competition against China.²⁷

32. Indeed, a possible transatlantic digital alliance is part of a broader framework in which different interests between the EU and the US should be balanced.²⁸

33. Furthermore, we may witness a historical period in the USA characterized by a radical intellectual and conceptual change which happens perhaps once or twice per century. In fact, the US may have completed its “*révolution conservatrice de Ronald Reagan.*”²⁹ Europe should therefore closely follow this possible new transition in the United States as it seeks to achieve a renewed trading equilibrium in the name of democracy.

34. For now, despite all these important variables, the authors prefer to remain as optimistic as Eleonor Fox, who stated that the “*Biden administration is much more likely to seek common ground*”³⁰ on a possible digital transatlantic alliance. ■

24 S. Kolhatkar, How Elizabeth Warren Came Up with a Plan to Break up Big Tech, *The New Yorker*, 20 August 2019; D. D’Souza, Elizabeth Warren’s Plan to Break up Big Tech Explained, Investopedia, 19 October 2019.

25 Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, United States, 2020.

26 R. Foroohar, A transatlantic effort to take on Big Tech, *Financial Times*, 6 December 2020.

27 Already cited in full *supra* note 17.

28 Such as the US request that Europe increase its military spending, the US setting the steel tax, and the EU’s trade surplus with the US. In particular, these conflicts come at a time when a proportion of public opinion in Europe is not keen on entering another Cold War. In their opinion, the conflict between techno-democracy and techno-authoritarianism may not lead to guaranteeing the safety of Western countries. Moreover, there is a growing distrust of US democracy. Finally, the shift in US foreign policy towards democracies of the Pacific undermines the role of Europe. Already cited in full *supra* note 3.

29 Interview with Laurence Nardon, Pascal Lamy, Renard Lassus, Thomas Philippon by P. Escaude and S. Kauffmann, “Joe Biden sera focalisé sur la protection des classes moyennes américaines,” *Le Monde*, 18 December 2020.

30 J. Mason, EU seeks collaboration with Biden administration on digital markets, *GCR*, 3 December 2020; See also H. First. E. M. Fox, Big Tech and Antitrust – Calling Big Tech to Account Under U.S. Law, for the House of Representatives Judiciary Committee, Antitrust Subcommittee (see *supra* note), August 2020, *NYU Law and Economics Research Paper* No. 20-53, available at SSRN: <https://ssrn.com/abstract=3672750>, where the authors suggest that “*The U.S. should be a thought leader in this global problem, not a ‘price taker.’*”

How the antitrust landscape may change in 2021: Compliance risks in a Democratic Washington*

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1. As Democrats prepare to rule the White House and the House (and possibly, though seemingly unlikely, the Senate) for the first time since 2011, the climate for antitrust legislation and enforcement is vastly different nine years later. Several factors have contributed to the altered landscape. First, days before the election, the Department of Justice sued Google, alleging abuse of monopoly power in search products. This suit represents the highest-profile DOJ monopolization suit since the Microsoft case in the mid-1990s. Second, the COVID-19 pandemic has led to even further growth of the largest technology platforms. This has led to a growing number of calls (within the antitrust community of enforcers, practitioners, and economists) that the antitrust laws have not kept pace with the rapid consolidation and growth of high market share companies. Third, Congress has entered the antitrust conversation in a major way through the House Committee on the Judiciary's Subcommittee on Antitrust and its majority report on its Investigation of Competition in Digital Markets (the "House Subcommittee Report"). Finally, while we are just digesting the 2020 election, foreign interference in the 2016 election and the issue of political fairness on the platforms has injected a populist interest in big technology. The result is an unprecedented spotlight on the nation's largest technology companies and on antitrust.

2. We have evaluated the House Judiciary's Antitrust Subcommittee recommendations, the Department of Justice's pre-election suit against Google, Minnesota Senator Amy Klobuchar's recent legislative proposals on antitrust, President-elect Biden's past engagement on competition and technology issues, and recent public statements by policymakers and observers to distill what might be on the horizon for antitrust.¹

3. We should note that each of these could receive its own extended academic discussion. Given the sheer number of proposals and activity (and an intervening election season), we instead summarize what is on the table. In addition, while we will not opine on the merits of each proposal in this summary, we have put together a free compliance program for your antitrust/competition team that looks at the types of documents and conduct that is fueling these investigations and the types of documents that can complicate companies' efforts to expand.

I. Probable areas of greater antitrust emphasis

4. Focus on "preferencing" by dominant firms. The House Subcommittee Report and the recent EU suit against Amazon all cite the alleged use of data residing on the platform to provide advantages to the dominant firm. Representative Cicilline, on November 12, 2020, noted that, of the House Subcommittee Report recommendations, targeting perceived self-preferencing has unique bipartisan support.² This reform could come from a variety of sources, from agency rulemaking to DOJ suits ala Microsoft/AT&T.

5. increased scrutiny on acquisitions by dominant firms. The House Subcommittee Report found that, "[a]lthough the dominant platforms collectively engaged in several hundred mergers and acquisitions between 2000-2019, antitrust enforcers did not block a single one of these transactions."³ Given the increase in market capitalization of the largest

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1 For this analysis, we assume the Senate remains under GOP control and there is no change to the filibuster rules.

2 Congressman David Cicilline comments to American Bar Association Antitrust Fall Forum, November 12, 2020.

3 House Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, 116th Cong., Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, at 387 (hereinafter House Subcommittee Report), available at <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=3429>.

tech platforms during the COVID-19 pandemic and a Democratic-led administration, FTC, and DOJ, we can expect scrutiny of mergers and acquisitions to increase—especially in the tech sector. We can also expect greater scrutiny on the acquisition of nascent competitors, including in new markets where the acquiring firm may not yet have significant market share.

6. Increase in merger fees to fund enforcement. Bipartisan legislation, proposed by Senators Grassley and Klobuchar, would increase the merger filing fees to \$2.5 million for any merger valued at over \$5 billion. These fees would fund greater regulatory enforcement at the DOJ and the FTC.

7. Closer scrutiny of pharma mergers. In a September 2019 letter to FTC Chairman Joseph Simons, Senator Klobuchar, joined by Senators Blumenthal, Booker, Hirono, Harris, Warren, Baldwin, Smith, and Sanders urged the FTC “to take appropriate action to protect consumers from acquisitions that may threaten competition in drug markets, raise drug prices, or reduce patient access to essential medications.”

8. Updated HSR premerger notification requirements. On September 21, 2020, the Premerger Notification Office of the FTC announced two new rules relating to premerger notice obligations and an intent to revisit several other HSR requirements and exemptions in the coming year. One new rule will expand HSR obligations for large investment funds by requiring reporting across all “affiliate” entities within the family of funds, and the second will attempt to clarify that investments below 10% are not reportable in most instances. Other rules that are up for potential revision include the exemption for REITs and other real property acquisitions, the calculation of transaction value for purposes of reporting thresholds, and treatment of LLCs and other non-corporate entities. The announcement portends expanded M&A reporting across the board in the future.

II. Proposed but less likely areas of antitrust reform*

9. Increased emphasis on structural separation of dominant firms. Senator Klobuchar and the House Subcommittee Report both emphasize the possibility of breaking up large firms to increase competition. Indeed, the Subcommittee Report makes this recommendation in Section 1 under the heading “Restoring Competition in the Digital Economy.”

* Should the Democrats win both seats in the Georgia runoff, that result would surely affect the odds of some of these reforms winning passage. However, even in a 50:50 Senate, we see any significant legislation still requiring 60 votes to pass, as the filibuster would likely survive any attempts at reform.

10. Increased enforcement of anti-monopoly provisions of Clayton Act. Senator Klobuchar has proposed legislation that would amend the Clayton Antitrust Act to ban “*exclusionary conduct*” if it poses an “*appreciable risk of harming competition*,” lowering the standard for enjoining deals. The bill would also create a presumption of illegality for a deal where one party has a market share of 50 percent or more or that has “*significant market power*,” placing the burden on deal parties to prove their deal does not have an “*appreciable risk of harming competition*.”

11. Increased civil penalty capability for antitrust enforcers. Senator Klobuchar’s legislation would allow the DOJ and FTC to pursue large civil penalties for any violations, including at most 15 percent of total U.S. revenue or 30 percent of the affected U.S. revenues.

12. Requiring interoperability by dominant firms. This proposal would require tech platforms to enhance the ability for data interoperability and portability. Interoperability and closed ecosystems (so-called “walled gardens”) have become hot topics, not only because of the prominent discussion in the House Subcommittee Report, but also because the lawsuit brought by Epic Games challenging the policies of the Apple App Store and the Google App Store revolve around this issue.

13. Shifting burden of proof on mergers by dominant firms. Both the House Subcommittee Report and Senator Klobuchar (see above) have proposed some version of shifting the burden of proof to a dominant firm to rebut a presumption that an acquisition is anticompetitive. Additionally, both the House Subcommittee Report and Senator Klobuchar have recommended eliminating efficiencies as an affirmative defense. The House Subcommittee Report also proposes that *all* mergers and acquisitions be subject to the Hart–Scott–Rodino process, not only those reaching the current size threshold.⁴

14. Prohibit acquisitions that “may lessen competition or tend to increase market power.” The House Subcommittee Report suggests legislatively overturning precedent requiring a merger challenger to prove that the potential or nascent competitor would have been a successful entrant in the “but-for” world.⁵

15. Increased scrutiny on two sided platforms. The House Subcommittee Report advocates overriding (1) *Ohio v. American Express* by clarifying that cases involving two sided platforms do not require plaintiffs to establish harm to both sets of customers; and (2) overriding *United States v. Sabre Corp.*, clarifying that platforms that are “two-sided,” or serve multiple sets of customers, can compete with firms that are “one-sided.”⁶

⁴ House Subcommittee Report at 393.

⁵ *Id.* at 394 (citing *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974)).

⁶ *Id.* at 399.

16. Clarification of intent of antitrust laws. The House Subcommittee Report explicitly advocates moving beyond “*consumer welfare*” as the ultimate goal of antitrust laws to consider the impact on “*workers, entrepreneurs, independent businesses, open markets, a fair economy and democratic ideals.*”⁷

17. Strengthening Section 2 anti-monopoly provisions. The House Subcommittee Report suggests studying the creation of a rebuttable presumption of dominance for sellers holding over 30% market share and buyers holding over 25%.⁸ The Report also suggests barring the requirement of recoupment in predatory pricing and reinvigorating theories of “*monopoly leveraging,*” tying, and unilateral steps refusal to deals by legislatively overriding defense-favorable precedents such as *Verizon v. Trinko*.⁹

While the Obama-era DOJ did not bring any monopolization suits in eight years, larger firms are likely to be under a brighter spotlight in the next Democratic administration.

18. Eliminate market definition requirement. Both the House Subcommittee Report and Senator Klobuchar propose eliminating the requirement from most antitrust claims unless market definition is specifically articulated in the statutory language.

19. With antitrust enforcement in favor, companies are advised to reinvigorate their compliance programs to help manage risk. ■

⁷ *Id.* at 392.

⁸ *Id.* at 396.

⁹ *Id.* at 397–398.

American antitrust and the near term: Consistency, one imagines, and some reasons why

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1. In predicting “Biden antitrust,” the safe money is on rough consistency. That’s a pretty obvious and uninteresting prediction in a country among whose antitrust elite so many define their own self-image on consistency across political transitions.¹ The interesting question is not whether policy and enforcement outcomes will probably be consistent, but why.

2. I believe that one basic misunderstanding complicates questions like this, at least in the United States and at this particular time. I think the mistake is the ordinary belief that ideas are what really matter in antitrust. I think that what matters instead is not ideas, but institutions.

3. In America, both sides in our struggle remain preoccupied with ideas. The dominant faction in American antitrust—the conservatives—even now perpetuate a claim that resists death, not for lack of reasons it should die but because, like other zombies, it is just really hard to kill: that American antitrust experts share an intellectual “consensus.” The claim is not only that ideas are what matter, but that we all already have the same ideas.

4. We do not, but that’s a different story.

5. Activism from the left likewise focuses mainly on ideas, and in the last ten years or so they have become an intense preoccupation for our progressive wing, which aims no less than to rewrite the law’s theoretical foundations (or, as they would say, to return its foundations to those that Congress intended). That new intensity seems closely linked to divisions within the Democratic Party at large, a tension of left versus center that has been around for more than fifty years, but that became bitter again during the presidential election of 2016.

6. In any case, these two sides share the same premise. They presume that substantive policy victories depend on which ideas are best argued and most persuasive. Fittingly, I guess, they presume a marketplace of ideas. They also agree to some large extent on which ideas matter, however bitter their confidence that the other side’s view of them is wrong. The right considers it sacred to restrict the law to protection of allocational efficiency. In practice, that point of view has favored a preoccupation with short-term price and output, especially end-use retail consumer prices, and deemphasizes firm size and market structure. The left takes that same preoccupation as its central enemy and believes that the fate of antitrust depends on convincing the world that it is incorrect. The sides even agree whose expression of the key ideas is most important. Whether he is their hero or their bête noire, much allegedly depends on defending or disproving the arguments of Robert Bork and a small collection of his fellow travelers.

7. I do not believe this fairly characterizes how antitrust policy will be made during the Biden administration. It may be that in some times or places the institutions of public policy are deliberative, and outcomes are driven by who wrote the best paper in a symposium or got the best coverage on editorial pages. I tend to think that it is not really how the policy has been made even in times and places where government worked better than American government currently does. For example, both the factions of the right and left have spent decades celebrating or commiserating the revolution of the “Chicago School.” That is, they believe that some academics made some arguments and changed the world because they persuaded judges. I think they are wrong. American law changed because Richard Nixon appointed a historically unusual number of Supreme Court Justices, and it was not until they were in place that a new bloc transformed what had been the most pro-enforcement antitrust court

¹ For just one of dozens of articles making this point, see T. B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 *Antitrust L.J.* 105 (2002).

in American history into the most anti-enforcement.² American law changed not because the judges changed their minds, but because the judges themselves were replaced.

8. But however any of that may be, any world in which American policy was made in a marketplace of ideas is over for now. American government will proceed during this presidential term as it has since at least 2000 or so, as a basically broken institution of zero-sum political struggle between two parties, in which substantive policies are much less important than electoral strategy. More specifically, I think that only two institutions probably really matter in American antitrust at least for the next two years, and perhaps for four or eight: the Senate and the courts.

9. The Senate matters because it controls executive and judicial appointments, and because under current circumstances even the simplest, least controversial legislation usually requires control of the White House and both chambers of Congress. How the Senate will govern these matters cannot yet be predicted, because so much still depends on two undecided elections in Georgia. Both Georgia Senate seats were up for election in 2020, and both were inconclusive, so they both go to runoff elections that will not be resolved until some time in January. Democrats must win both to take control of the Senate.

10. Senate control will influence political appointments to the antitrust leadership to some degree. Not that many of the leadership roles require Senate confirmation—only the assistant attorney general, the Federal Trade Commission chair, and other FTC seats. There may not even be any commissioner vacancies, unless current Chair Joe Simons steps down, though one imagines he will.³ Those few Senate-confirmed positions appointments do matter, as it is thought that the appointees will then largely control the selection of their subordinate political staff, and those staffers will heavily color the nature of enforcement decisions. That said, it is not that clear that appointments would differ that much under either scenario.

11. If Republicans keep control, as seems likely,⁴ Senate leaders would no doubt gladly and visibly kill the nomination of any very outspoken figures, particularly of the kind for whom American progressives are eager, as they have been critical of law enforcement and believe that appointment of tougher-minded enforcement officials is key.⁵ So it seems unlikely the White House would even bother to appoint some very aggressive enforcer if Repub-

licans keep control. If in fact Democrats win the Senate, it is not impossible that President Biden could appoint some fearsome and devastating hero of plaintiff or state government litigation, like Lloyd Constantine, Kathleen Foote, Steve Shadowen, or Bonnie Sweeney, or some outspoken academic looking to make a difference, like Scott Hemphill or Tim Wu. History and politics, however, disfavor it. Presidents have sometimes appointed very aggressive antitrust leaders, but usually only when antitrust was high on the public agenda and other political factors favored enforcement vigor. Thurman Arnold, for example, the policy's most tireless and celebrated enforcer, was appointed by a very popular, personally engaged president whose party dominated Congress. Roosevelt appointed Arnold to lead the flagship policy of his newly redesigned "Second New Deal," in the wake of the famous *Schechter* case⁶ and the collapse of the First New Deal.⁷ If evidence were needed how distant such days are from our own, consider that Roosevelt and his Congress worked together to quadruple Arnold's budget and quintuple his staff in just a few years.⁸ Imagine any such thing happening today, while you imagine which nominations might make sense before a Senate under either party's control. (And remember too that even under those favorable circumstances, it was only a relatively short period of years before Arnold left government, apparently disillusioned that business through political influence managed to kill his enforcement program.⁹)

12. A separate question, in any event, is what difference the appointments actually make. I hardly mean to imply that they make none; they definitely will matter. No appointee will win cases that they do not bring, and some appointees will bring more and different cases than others. Thurman Arnold lost cases, after all, and it was important that he was willing to bring risky cases to expand the law. Also, one separate thing will in fact change, regardless of who controls the Senate, and it is very welcome even if it results in no additional or better enforcement. The administration of the antitrust agencies will return to rule of law values and administrative regularity, ending four years in which the Antitrust Division front office was caught in improprieties not seen since the Nixon administration.¹⁰

13. But what will not change is that any appointee will face the same judiciary as did the Trump agencies. In a policy in which institutions are more important than ideas, the institutions that matter by far more than others are the courts, and above all the Supreme Court. In that, I will

² For elaboration, see C. Sagers, #LOLNothingMatters, 63 *Antitrust Bull.* 7, 20–21 & nn. 69–70 (2018).

³ Even though a new president can name a new chair, Chair Simons' term would still continue for some years. However, chairs demoted from chairmanship by incoming presidents have traditionally voluntarily resigned.

⁴ See, e.g., N. Layne, Georgia Republicans Fired Up for Senate Runoff Despite 'Rigged' Election Fears, Reuters, Dec. 11, 2020, available at <https://www.reuters.com/article/usa-election-georgia-maga/georgia-republicans-fired-up-for-senate-runoff-despite-rigged-election-fears-idUSKBN28L1GQ>.

⁵ Cf. J. Eisinger, *The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives* (Simon & Schuster, 2017).

⁶ *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁷ See generally E. W. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Princeton University Press, 1966); S. Weber Waller, *Thurman Arnold: A Biography* (New York University, 2005); R. Hofstadter, What Happened to the Antitrust Movement? in *The Paranoid Style in American Politics and Other Essays* 188 (Knopf, 1964).

⁸ Hofstadter, *supra* note 7, at 230.

⁹ C. Sagers, *United States v. Apple: Competition in America* 262–63 (Harvard University Press, 2019).

¹⁰ C. Sagers, The Utter Failure of the Trump Administration's Antitrust Chief, *Slate*, Aug. 10, 2020, available at <https://slate.com/business/2020/08/antitrust-doj-delrahim-trump.html>.

reaffirm a prediction that the most important contemporary event in antitrust, and perhaps the most important since the 1930s, was not any intellectual development or any case or policy, but the presidential election of 2016. Donald Trump was able to nominate three Justices, including by replacing one of the court's liberals. Surely a book or more could be written on the state of the developing case law, and the alarm caused by decisions like *Ohio v. American Express*,¹¹ *FTC v. Qualcomm*,¹² *United States v. Sabre*,¹³ *New York v. Deutsche Telekom*,¹⁴ *United States v. AT&T*,¹⁵ or what no doubt will be coming disasters like the court's decision in *Alston v. NCAA*, on which it just granted certiorari.¹⁶ I have no doubt that these trends reflect the message to lower courts from the Supreme Court's many antitrust decisions, only a tiny fraction of which have been won by plaintiffs on the merits over several decades. Suffice to say for this short piece that times are bad in this law, if one believes in it at all. It appears that many of our judges now find it very hard to imagine an antitrust plaintiff ever winning, and that the law's "sole consistency" is that "the Government always [loses]."¹⁷

14. Senate control is also relevant to this problem, if it is true that antitrust is misdirected, and that the fault is with the courts. For better or worse, America's life-tenured federal judiciary have granted themselves an extraordinary freedom to make antitrust law as they like, and they acknowledge quite explicitly that they have done so—in fact, they claim that it was Congress's design. Judges are also much more influential in any individual case than other institutions. The happenstance of random judicial assignment often seems pretty plainly outcome-determinative, however much we might prefer it were otherwise under a more rigorous rule of law. So, in principle, meaningful change could come during a Biden administration from repopulation of the courts, as it did during the Nixon administration. While that is not impossible, however, it seems awfully unlikely. The current makeup of the Supreme Court is lopsidedly conservative and comparatively young, and will remain unchanged by Joe Biden except in the unlikely circumstance that two conservative vacancies occur. And even if they do, if the Senate remains in Republican hands, control over the appointment will be much more in the hands of Senate leadership than at any prior time. Senator Mitch McConnell would no doubt retain the leadership, and he has taken

the hardest line in American history that the Senate is free to oppose any nominee to any court, including the Supreme Court, apparently through an entire congressional term if need be. He has stated the view that election of the Senate majority is a popular mandate to take any action the majority sees fit on any nomination, no matter how extreme and even if the majority in question is only the barest.

15. And so I reach the same conclusion being reached by many other Americans who care about antitrust and think it has been wrecked, and hoping for action that even five years ago I would have said was crazy. The only hope left is legislative reform of statutory antitrust. I think Congress should amend the law to reaffirm its own intention that the law be enforced proactively, aggressively, prophylactically, and for real, without giving every defendant the benefit of every conceivable doubt. Congress should do that in a way that keeps the courts from thwarting its intent through nullifying interpretations, as they have done many times before. Obviously, Senate control is again quite relevant. Under those Senate norms that still remain—in which we retain a filibuster rule for ordinary legislation—a party with fewer than 60 seats can typically do little. The two parties do not apparently work together in hardly any fashion. The party that holds the majority, even if only by one vote, controls the institution and its actions outright, but the minority can typically keep it from taking meaningful substantive action. Where the opposing party holds the White House, Senate minorities have filibustered essentially all legislation, apparently just to deny the opposing President any opportunity for campaign-trail self-congratulation. When the majority party can take effective action, it will only be in extraordinary circumstances or by using a filibuster exception, like the budget reconciliation procedure that was used in connection with the Obamacare legislation in 2010, and in subsequent Republican efforts to repeal it.¹⁸ But antitrust, however important and however much it has returned to popular consciousness, seems unlikely to be so high on the Democratic agenda that it is chosen as one of the extraordinary matters Democrats prioritize in this way, even if they win Senate control.

16. And on top of all of that, it does not help that in this world, in which we dwell on ideas and not institutions—perhaps because institutions seem boring, and do

11 138 S. Ct. 2274 (2018). See C. Sagers, *Ohio v. American Express: Clarence Thomas Sets Sail on a Sea of Doubt*, and, *Mirabile Dictu, It's Still a Bad Idea*, *Promarket*, June 27, 2018, available at <https://promarket.org/2018/06/27/ohio-v-american-express-clarence-thomas-sets-sail-sea-of-doubt-mirabile-dictu-still-bad-idea>.

12 969 F.3d 974 (9th Cir. 2020).

13 452 F.Supp.3d 97 (D. Del. 2020).

14 439 F.Supp.3d 179 (S.D.N.Y. 2020).

15 310 F.Supp.3d 161 (D.D.C. 2018). See C. Sagers, *The Worst Opinion in Living Memory: AT&T/Time Warner and America's Broken Merger Law* (2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3346431.

16 *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239 (9th Cir. 2020), cert. granted sub nom. *NCAA v. Alston*, 20-512, 2020 WL 7366281 (U.S. Dec. 16, 2020).

17 *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

18 See V. R. Newkirk II, *The Limits of Using Reconciliation to Repeal Obamacare*, *The Atlantic*, Jan. 13, 2017, available at <https://www.theatlantic.com/politics/archive/2017/01/reconciliation-obamacare-repeal-gop-strategy/513059>.

not invite intellectual abstraction or Manichean dreams of good and evil—we see sharp divisions even within our factions. Only liberals and progressives in America favor more antitrust enforcement, but among us we have several hotly disputed disagreements, and some difficulties getting along. It reflects in microcosm the struggle of left and center of the election of 2016. So in 2021 and thereafter, it seems like it will be a fair bit of work to build any effective reform coalition.¹⁹

17. So, while I think that antitrust law will remain basically the same for the next four years, it is emphatically not because we all agree that it should. I think it is fairly likely that less than a majority of us do. It will be because the only institutions that matter are so radically, heavily stacked against change. ■

¹⁹ Some further thoughts in this vein at Sagers, *supra* note 2, at 17–20, and C. Sagers, The News About Antitrust’s Impending Resurgence Has Been Greatly Exaggerated, *Promarket*, July 26, 2019, available at <https://promarket.org/2019/07/26/the-news-about-antitrusts-impending-resurgence-have-been-greatly-exaggerated>.

Back to normal? Cartel enforcement under the Biden administration

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I. Introduction

1. As the United States prepares to shift from the Trump to the Biden administration, significant changes are anticipated with respect to criminal cartel enforcement at the U.S. Department of Justice Antitrust Division (“DOJ” or the “Division”). And while it may be a common perception that antitrust enforcement increases under Democratic administrations, a substantial upward swing in enforcement is especially imminent given the historic low level of cartel enforcement under the outgoing administration.

2. Yet, while active investigations and enforcement are anticipated to increase significantly, some recent policy changes implemented under the Trump administration are expected to remain intact. The 2019 policy shift that the DOJ will take effective corporate compliance programs into account in charging decisions and penalty recommendations, after many years of refusing to do so, is very likely to remain in place. Incentivizing companies to invest in corporate compliance is now embedded in antitrust enforcement policy and is being used to complement the fruitful corporate leniency program that predated it. The DOJ will almost certainly continue to rely on this precedent, though it may be interpreted more rigidly, and deferred prosecution agreements (“DPAs”) in particular may be less frequently utilized.

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II. Cartel enforcement

1. Current status

3. Criminal antitrust enforcement in the United States fell to historic lows under the Trump administration. From 2017 through 2020, the DOJ filed 24, 18, 26, and 20 criminal antitrust cases, respectively.¹ This is a stark contrast to the average of 62.4 criminal antitrust cases filed from 2011 to 2015.² This downward trend has plunged prosecution levels to depths unseen since the 1970s. Fines and penalties also dropped to the lowest levels seen in nearly two decades.³ From 2017 to 2020, fines ranged from \$67 to \$529 million, plummeting from a staggering \$3.6 billion in 2015 and totals in the \$1 billion range in the years from 2012 to 2014.⁴ While there is bipartisan support for more rigid criminal antitrust enforcement, it has nonetheless remained lax under President Trump in comparison to previous administrations, both Democratic and Republican.

4. This precipitous drop in enforcement was not the result of any dramatic policy changes. Rather, the Trump administration’s business-friendly agenda was carried out largely through stealthier means. Several grand jury investigations were closed—at least one over the objection of line prosecutors—before charges could be brought. In addition, the hiring freeze imposed across the DOJ at the start of the Trump administration, and the resulting significant attrition of experienced front-line prosecutors in DOJ field offices, very naturally led to a decline in enforcement. There is every expectation that prosecutor headcount will increase under Biden’s DOJ, and that more enforcement actions will naturally follow.

5. Despite the more lenient approach to enforcement under the Trump administration, there has also been a perception that antitrust enforcement has been used as a tool by the DOJ to carry out President Trump’s political agendas. This concept may be best observed in the DOJ’s

recent antitrust investigation into California vehicle emissions. The Trump administration's desire to roll back global warming regulations is obvious; during his time in office, Trump significantly weakened or dropped out of approximately 125 environmental safeguards,⁵ including the United States' withdrawal from the Paris Agreement.⁶ However, the efforts to change domestic environmental policies reached a whole new level in September 2019 when Trump used Twitter to signal his desire that the DOJ raise an antitrust inquiry into four automakers over their agreement to adhere to California's more stringent emissions standards, rather than the revised federal standards introduced by the Trump administration.⁷ A DOJ antitrust investigation immediately followed. This investigation was widely criticized as partisanship with no basis (Noerr–Pennington, anyone?), and was precipitously closed in February 2020.⁸ The DOJ denied taking cues directly from Trump, but the ease at which the public believed that Trump's DOJ would be willing to bend to his political whim shows eroded confidence in the independence of the agency's decision-making.

2. Future enforcement/policies

6. As expected with previous Democratic administrations, we will likely see an uptick in antitrust enforcement under the Biden administration. Criminal antitrust cases, fines, and investigations are all expected to increase, particularly when compared to the low levels of enforcement during the Trump administration. In addition, enforcement is likely to expand in light of the Covid-19 pandemic, as such a crisis can lead to increased incentives for companies to collude. Just how much more aggressive the Biden administration will be with antitrust enforcement is yet to be seen, since Biden is largely considered a centrist and will need to decide how to frame his policies around the competing schools of thought within the Democratic Party itself.⁹ As with all new administrations, the intensity of antitrust enforcement under Biden will largely depend on who is appointed to head the DOJ and FTC. Despite the uncertainty, there can be no question that cartel enforcement will intensify under the Biden administration as compared to the lower enforcement levels seen under the Trump administration.

7. It is reasonable to expect that Biden's DOJ will have a greater focus than the prior administration on the detection and prosecution of international cartels. We are not

aware of a single international cartel case or investigation initiated under the Trump administration (although admittedly we cannot know every pending matter due to grand jury secrecy rules). This is a radical departure from enforcement by prior administrations, in which significant international cartels seemed to be uncovered every year or two—vitamins, air cargo, auto parts, freight forwarding, Libor, FX, and capacitors being just a few of the many blockbuster global cartel cases from the last 20 years.

8. Some practitioners have speculated that the decline in international cartel enforcement can be traced to a drop in leniency filings, although it is unclear whether the numbers actually back this up. But there is no dispute that many leading practitioners feel that the cost of leniency—in terms of burden, business disruption, and legal expense—has in some cases begun to outweigh the benefits, and that a number of companies have decided to take their chances that they will not be caught rather than self-reporting misconduct and potentially opening Pandora's box.

9. On the other hand, one feature of the Trump DOJ that is likely to continue under Biden is the focus on cartels where the U.S. government is the victim. The Trump DOJ made such matters a priority, creating the Procurement Collusion Strike Force¹⁰ to coordinate the response to government procurement, grant and program funding schemes. The Trump DOJ also broke with past practice by utilizing the False Claims Act¹¹ and Section 4A of the Clayton Act¹² to recover civil damages on top of criminal fines in cases where the U.S. government was a victim.¹³

10. It will be interesting to observe how the DOJ under the Biden administration will deal with no-poach and wage-fixing cases. A no-poach agreement is an arrangement between employers not to hire each other's employees. Historically, the DOJ treated no-poach and wage-fixing agreements as civil violations. Then, in 2016, the DOJ and FTC issued Antitrust Guidance for Human Resource Professionals,¹⁴ alerting individuals tasked with hiring decisions to antitrust law risks. After the issuance of these guidelines, the DOJ promised it would take a more aggressive approach to such violations,

5 J. Eilperin et al., Trump rolled back more than 125 environmental safeguards. Here's how, *Washington Post* (Oct. 30, 2020), <https://www.washingtonpost.com/graphics/2020/climate-environment/trump-climate-environment-protections/>.

6 U.S. Department of State, Press Statement: On the U.S. Withdrawal from the Paris Agreement (Nov. 4, 2019), <https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement>.

7 H. Tabuchi and C. Davenport, Justice Dept. Investigates California Emissions Pact That Embarrassed Trump, *NY Times* (Sept. 6, 2019), <https://www.nytimes.com/2019/09/06/climate/automakers-california-emissions-antitrust.html>.

8 J. Byrnes, DOJ dropping antitrust probe of four major automakers, *The Hill* (Feb. 7, 2020), <https://thehill.com/homenews/administration/482114-doj-dropping-antitrust-probe-of-four-major-automakers>.

9 M. Acton, Democratic Party's antitrust reform agenda faces gridlock regardless of election outcomes, US FTC's Wilson says, *MLex* (Nov. 19, 2020).

10 U.S. Department of Justice, Justice Department Announces Procurement Collusion Strike Force: a Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding (Nov. 5, 2019), <https://www.justice.gov/opa/pr/justice-department-announces-procurement-collusion-strike-force-coordinated-national-response>.

11 31 U.S.C. §§ 3729–3733.

12 15 U.S.C. § 15.

13 See, e.g., *United States v. GS Caltex Corp.*, 2019 WL 3765371 (S.D. Ohio Mar. 14, 2019); *United States v. Kavod Pharm.*, No. 2:19-cr-00689 (E.D. Pa. Dec. 3, 2019); U.S. Department of Justice, Three South Korean Companies Agree to Plead Guilty and to Enter into Civil Settlements for Rigging Bids on United States Department of Defense Fuel Supply Contracts (Nov. 14, 2018), <https://www.justice.gov/opa/pr/three-south-korean-companies-agree-plead-guilty-and-enter-civil-settlements-rigging-bids>; U.S. Department of Justice, Second Pharmaceutical Company Admits to Price Fixing, Resolves Related False Claims Act Violations (Dec. 3, 2019), <https://www.justice.gov/opa/pr/second-pharmaceutical-company-admits-price-fixing-resolves-related-false-claims-act>.

14 U.S. Department of Justice, Antitrust Guidance for Human Resource Professionals (Oct. 2016), <https://www.justice.gov/atrf/file/903511/download>.

pledging to “*proceed criminally against naked no-poach and wage-fixing agreements.*”¹⁵ For example, in January 2018, Assistant Attorney General for Antitrust Makan Delrahim disclosed that the DOJ had several ongoing criminal no-poach grand jury investigations, and promised that announcements would be made in coming months.¹⁶ That was followed by a deafening silence for almost three years, until December 2020, when the DOJ brought its first criminal wage-fixing case.¹⁷ The facts in that indictment seem particularly egregious, with allegations of substantial obstruction of an FTC investigation in addition to the wage-fixing conduct. Skeptics still question whether juries will vote for felony convictions against mid-level human resources professionals engaging in no-poach or wage-fixing agreements, and it remains to be seen whether this prosecution is an outlier or a harbinger of more to come.

III. Compliance programs

11. The DOJ had long been hesitant to credit corporate compliance programs in criminal antitrust investigations. The DOJ’s July 2019 Policy to Incentivize Antitrust Compliance¹⁸ changed that by finally allowing prosecutors to consider effective corporate antitrust compliance programs at both the charging and sentencing stages. Under the new guidance, effective compliance programs may even qualify companies for DPAs, a departure from the Division’s prior reluctance to grant DPAs for fear of dampening the effectiveness of its leniency program. While these were some of the most significant DOJ policy shifts seen under the Trump administration, it is unlikely the Biden administration will look to walk them back.

12. Since his appointment in 2017, even though enforcement action numbers have dropped, AAG Delrahim has been focused on clarifying the rules and promoting transparency in prosecuting decisions. The 2019 guidance and the 2020 updates are focused on that goal. There seems to be bipartisan consensus that the antitrust laws need updating and clarification. Therefore, no matter whom Biden chooses to replace Delrahim, it is not likely that this new guidance on compliance programs will be significantly curtailed or amended. But even with the guidance intact, the Biden administration is likely to be more stringent in its interpretation of the guidance and more rigid in handing out DPAs.

13. AAG Delrahim has emphasized that the guidance is not a “one size fits all” formula. Rather, prosecutors are to evaluate corporate compliance programs on a case-by-case basis using three fundamental questions to guide the analysis. Those questions, as updated in June 2020, are:

1. *‘Is the corporation’s compliance program well designed?’*
2. *‘Is the program being applied earnestly in good faith?’ In other words, is the program adequately resourced and empowered to function effectively?’*
3. *‘Does the corporation’s compliance program work’ in practice?’*¹⁹

14. Prosecutors are instructed to consider these questions as a starting point in conjunction with a non-exhaustive list of other factors that may apply depending on the facts of the case, size of the company, etc. This more flexible analysis will allow the Biden administration to shape the existing guidance to its policy goals depending on how strictly it interprets each question and how rigidly it construes what it means to have an “effective” compliance program. This has the potential to seriously limit how many companies qualify for DPAs, as having an “effective” compliance program, however interpreted, will likely continue to be a prerequisite to qualifying for a DPA.

15. That the Division is now willing to credit a company for having a strong compliance program, even if that program failed to prevent a violation, is a welcome policy shift. Previously, the Division’s approach seemed to be that if a violation occurred, then any compliance program the corporation had must have been ineffective since it failed to prevent the violation. Crediting compliance is a step in the right direction, and the incoming administration should recognize that encouraging compliance will not undercut the DOJ’s leniency program.

IV. Conclusion

16. President-elect Joseph Biden, a moderate Democrat, is likely to seek a balance between the progressive “hipster antitrust movement” and the more hands-off approach of the conservatives. The future of the DOJ lies in the hands of those appointed by Biden during his presidency, as well as the political makeup of both houses of Congress. While it is certainly projected that there will be increased enforcement activity and policy changes under the new administration, some policies from the outgoing administration will likely remain intact or expanded in the next four years. ■

15 U.S. Department of Justice, Division Update: No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute “No-Poach” and Wage-Fixing Agreements (Apr. 10, 2018), <https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements>.

16 E. Taylor, Justice Dept. Is Going After “No-Poach” Agreements, *Bloomberg Law* (Jan. 19, 2018), <https://news.bloomberglaw.com/business-and-practice/justice-dept-is-going-after-no-poach-agreements/>

17 *United States v. Jindal*, No. 4:20-cr-00358 (E.D. Tex. Dec. 9, 2020).

18 U.S. Department of Justice, Antitrust Division Announces New Policy to Incentivize Corporate Compliance (July 11, 2019), <https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance>.

19 U.S. Department of Justice, Evaluation of Corporate Compliance Programs (June 2020), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

Biden antitrust: At crossroads

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1. At the outset of a change in administrations, antitrust enforcement in the United States stands at a crossroads. The Trump administration will soon hand over to President-elect Biden a docket of ongoing antitrust litigation including not only the potentially historic actions against Google and Facebook, but also more court challenges to mergers than have ever been pending at a single point in time. Also before the courts is the significant challenge to the FTC's authority to obtain disgorgement relief in antitrust cases, awaiting oral argument before the United States Supreme Court on January 13, 2021.

2. In addition to the array of pending antitrust litigation that will be handed over to the Biden administration, the new team will also inherit the continuing investigations into the conduct of other leading technology firms. Amazon reportedly is under investigation by the FTC and state attorneys general, and Apple under investigation by the Antitrust Division and a coalition of state attorneys general.

3. At the same time, significant policy questions are being raised with regard to the fundamental purpose of the antitrust laws. What is being questioned is whether the consumer welfare standard should remain the fundamental purpose of the antitrust laws, or whether antitrust should also be employed as a means to solve a range of issues including income disparity, the promotion of small business, and consumer privacy interests. Some doubts have been raised whether the existing antitrust laws are sufficient to meet the challenges of the new economy.

4. And some have suggested that legislative change may be necessary to overcome the antitrust-skeptical views of an increasingly conservative judiciary. Suggestions for legislative change are being raised not only at the federal level, but also at the state level where, for example, New York is considering legislation that would subject unilateral conduct to an abuse of dominance standard not previously incorporated in the jurisprudence of this country.¹

5. Over the last three years in particular, the Antitrust Division has been very active in filing amicus briefs in both federal district and appellate courts in private cases,

in an effort to let its views be known and to seek to shape the results in those actions. Most notably, the Antitrust Division intervened in the FTC's enforcement challenge to Qualcomm's patent licensing practices. Perhaps in response to changes in the judiciary, it seems reasonable to expect that a Biden antitrust team would continue or intensify the efforts to influence the development of the law.

6. Bipartisan calls have been made for more vigorous antitrust enforcement by the federal antitrust enforcement agencies, although these calls are accompanied by a growing recognition that agency budgets are severely limited.

7. In the face of these uncertainties, President-elect Biden's views on antitrust enforcement are relatively unknown. Candidate Biden did not say much more than that he favored spending more on antitrust enforcement. Unlike less moderate Democratic candidates, his stump speeches did not call for antitrust-triggered break-ups of Facebook, Google, or Amazon.

8. The report and recommendations of the Biden-Sanders Unity Task Force,² released last summer, were meant to bridge Biden's more moderate platform with the more progressive goals of Senators Bernie Sanders and Elizabeth Warren. That report expressed a concern over "*the increase in mega-mergers and corporate concentration across a wide range of industries, from hospitals and pharmaceutical companies to agribusiness and retail chains.*" But this expressed concern was not limited to traditional antitrust issues. The Unity Task Force recommended a review of mergers and acquisitions approved during the Trump administration in order to evaluate a plethora of concerns, including not only "*whether any have increased market concentration, raised consumer prices (. . .) or reduced competition,*" but also whether such mergers have "*demonstrably harmed workers, increased racial inequality.*" In case the point was missed, the report reiterated that "*Democrats will direct regulators to consider potential effects of future mergers on the labor market, on low-income and racially marginalized communities, and on racial equity.*"

¹ <https://www.nysenate.gov/newsroom/in-the-news/michael-gianaris/capitol-forum-new-york-state-antitrust-senate-assembly-bills>.

² <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf>.

9. But post-nomination, pre-election attempts to harmonize Democratic Party views may not necessarily reflect the actual direction of post-election President-elect Biden. Personnel choices are more likely to reflect policy directions than intra-party political statements.

10. At the current point in time, President-elect Biden has not yet identified a proposed assistant attorney general to lead the Antitrust Division. And at the FTC, the opportunity for the new administration to make meaningful change in enforcement priorities may take some time. Because of the staggered expiration slots, the first term of a sitting Republican commissioner does not end until September 2023. And even if Chairman Simons opts to resign, which has been rumored, it may take the Senate some time to approve a new Democratic commissioner—depending on the outcome of the Georgia run-off election in January.

11. We do know that President-elect Biden's transition team on antitrust issues includes Bill Baer, Heather Hippsley, and Gene Kimmelman, all veteran antitrust enforcers. But leadership positions at the agencies remain to be filled, and there are no apparent frontrunners for leadership at either the Antitrust Division or the FTC at the present time. And on Capitol Hill, pending the determination of the Georgia Senate seats, it is unclear whether Amy Klobuchar, whose antitrust views are well known, will be the chair of the Senate Judiciary's Subcommittee on Antitrust, Competition Policy and Consumer Rights—or become its chairman.

12. Control of Congress may be particularly significant for antitrust enforcement in the coming years for a variety of reasons. Although there appears to be growing consensus view that enforcement agency budgets are strapped, insight into the actual priority placed on more vigorous antitrust is likely to come with the degree to which agency budgets are increased. In addition, Congress will be called upon to act if, as some have anticipated, the Supreme Court this term reverses the Ninth Circuit in *FTC v. AMG Capital Management LLC*³ and concludes that

Section 13(b) of the Federal Trade Commission Act does not authorize the Commission to obtain disgorgement as a remedy in antitrust cases.⁴

13. And, significantly, there are calls for significant reforms to existing antitrust litigation. The authors of the Washington Center for Equitable Growth (“CEG”) report on “Restoring competition in the United States”⁵ call for substantive and procedural amendments to the antitrust laws. Although lacking in specificity, the CEG authors, including Bill Baer, appear to suggest the advancement of per se rules, heightened standards for unilateral conduct, and clarity regarding the applicability of the antitrust laws to the loss of potential and nascent competition.⁶ This fall's House Subcommittee on Antitrust Majority Staff Report and Recommendations included various legislative recommendations, including introducing a prohibition on abuse of dominance into Section 2 and restoring presumptions and bright-line rules into Section 7.⁷ And, at the same time, Senator Lee has recently proposed legislation to dismantle the FTC and unify federal antitrust enforcement at the Antitrust Division.⁸

14. The general calls for more vigorous antitrust enforcement are, in part, a response to what some have referred to as a growing market power problem in the United States. Regardless of one's views on the issues, there can be no dispute that Section 2 has not been the source of much federal antitrust enforcement during the last two decades. These cases, however, are very difficult to prosecute and require careful attention and the commitment of very significant resources.

15. So, what will Biden antitrust mean? It is too early to tell at this point. Two early indicators will be the appointees that President Biden selects to lead his Antitrust Division and Federal Trade Commission (when that opportunity arises), and the resources that President Biden seeks to allocate to the enforcement of antitrust laws. The antitrust issues facing our economy are far too significant not to receive intense focus from the new administration. ■

3 *AMG Cap. Mgmt., LLC v. FTC*, No. 19-508, 2020 WL 38655250 (July 9, 2020).

4 S. Ross Lahlou, G. Luib, and M. Weiner, High Stakes at the High Court: The FTC's Disgorgement Authority Comes Before the Supreme Court, 35 *Antitrust* 71 (Fall 2020).

5 <https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states>.

6 *Ibid.*, at 12–13.

7 Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

8 https://www.lee.senate.gov/public/_cache/files/430ceb98-d17e-4a24-a770-4cf-873b4c208/one-agency-act.pdf.

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