

A New Antitrust Prescription?

Deborah A. Garza

The new U.S. President ran a non-traditional, “outsider’s,” campaign that challenged Republican orthodoxy, raising questions (for example) about the U.S.’s continued commitment to international free trade and sounding a populist alarm about corporate consolidation, at least in the media. What, if anything, does this tell us about antitrust enforcement in a Trump administration?

The U.S. has not tended to experience wide swings in antitrust enforcement from one administration to another, even with changes to the political party in control. There is general consensus for an enforcement paradigm “grounded in contemporary economic principles” with consumer welfare as its lodestar.¹

This is a good thing. Consistency—along with transparency and adherence to the rule of law—provides the clarity and certainty U.S. businesses need to innovate and compete within the bounds of the law. It also enables the U.S. to persuade other nations to adhere to the same sound enforcement principles.

Nevertheless, antitrust enforcement has become increasingly aggressive over the last several years. Citing an asserted popular “surge of enthusiasm” for antitrust enforcement, Obama administration officials questioned a supposed “unfounded . . . presumption that mergers often benefit competition,” opined that enforcers had been overly concerned about the costs of erroneous enforcement and too insistent on concrete evidence of harm to competition, and began to emphasize notions of “economic fairness” over evidence of harm to consumer welfare.²

There is reason to believe that the new administration will revert to a course that hews more closely to the recent Republican approaches to antitrust enforcement.

Antitrust enforcement theoretically could go off the rails—for example, if decisions were made to prosecute a particular company or companies ahead of a well-reasoned factual basis to do so. Or if decisions were made based on deals trading clear consumer harm in one market for dubious gains elsewhere.³ Or if the U.S. began to use antitrust law to achieve industrial policy objectives (as some believe other jurisdictions have done).

But confirmation hearing testimony by Attorney General nominee Senator Jeff Sessions is reassuring. Senator Sessions stated his view that U.S. antitrust policy must be consistent, “as clear as

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Deborah A. Garza is a partner with Covington & Burling in Washington, D.C. and a former Deputy Assistant Attorney General (May 2007–Nov. 2008) and Acting Assistant Attorney General (Nov. 2008–Jan. 2009) for Antitrust, U.S. Department of Justice, and Chair, Antitrust Modernization Commission.

¹ See Maureen K. Ohlhausen, Comm’r, Fed. Trade Comm’n, International Convergence, Competition Policy and the Public Interest (Mar. 8, 2014), <https://www.ftc.gov/public-statements/2014/03/international-convergence-competition-policy-public-interest>.

² See, e.g., Renata Hesse, Acting Ass’t Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, And Never the Twain Shall Meet? Connecting Popular and Professional Visions for Antitrust Enforcement,” Remarks Before the 2016 Global Antitrust Enforcement Symposium (Sept. 20, 2016), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-opening>.

³ See “Does Competition Create or Kill Jobs,” Contribution from the United States to the Global Forum on Competition, Organization for Economic Cooperation and Development, Directorate for Financial and Enterprise Affairs, Competition Committee (Oct. 20, 2015), <https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/1510jobscompetition.pdf>.

possible,” and free of politicization or mixed agendas. He added that the Antitrust Division is an “important Division that requires great integrity and ability . . . in [its] leadership.”⁴ I am optimistic about the strength of the new administration’s appointments to both the Antitrust Division and the FTC. ●

⁴ See <https://www.c-span.org/video/?420932-101/attorney-general-nominee-jeff-sessions-testifies-confirmation-hearing>, (Jan. 19, 2017 1:11:29).