

2017

THE YEAR IN PREVIEW



A populist now: What can antitrust do for inequality?

In the past year, a chorus of voices on the political left in the US has called for more aggressive competition enforcement as a means to help remedy the problem of inequality, while controversial political candidates in both parties have blamed lax international trade rules for unemployment and other voter woes. **Pallavi Guniganti** and **Ron Knox** explore what antitrust might be able to do for some of the concerns that drove the wildest presidential election in living memory.

When Donald Trump won a shock victory in November's US presidential election, it set off a cascade of praise among the pundit class for the newfound power of populism: the philosophy that power should lie with ordinary people rather than corporate and government elites.

Trump's positioning as a rogue outsider gripped the imagination of voters who felt the existing economic and political system had failed them. He attacked policies that had united recent presidents of both parties – such as the lowering of trade barriers and the welcoming of immigrants – as detrimental to the interests of average Americans. This included the current mainstream antitrust view of vertical deals as potentially procompetitive, and of online retailers as a desirable source of competition.

Regardless of his motivations and the likelihood that his administration will follow through on those campaign comments, his pre-election remarks suggest that under Trump, populism will infiltrate the margins of US antitrust enforcement, and do away with a generation of neoliberal and laissez-faire competition policy.

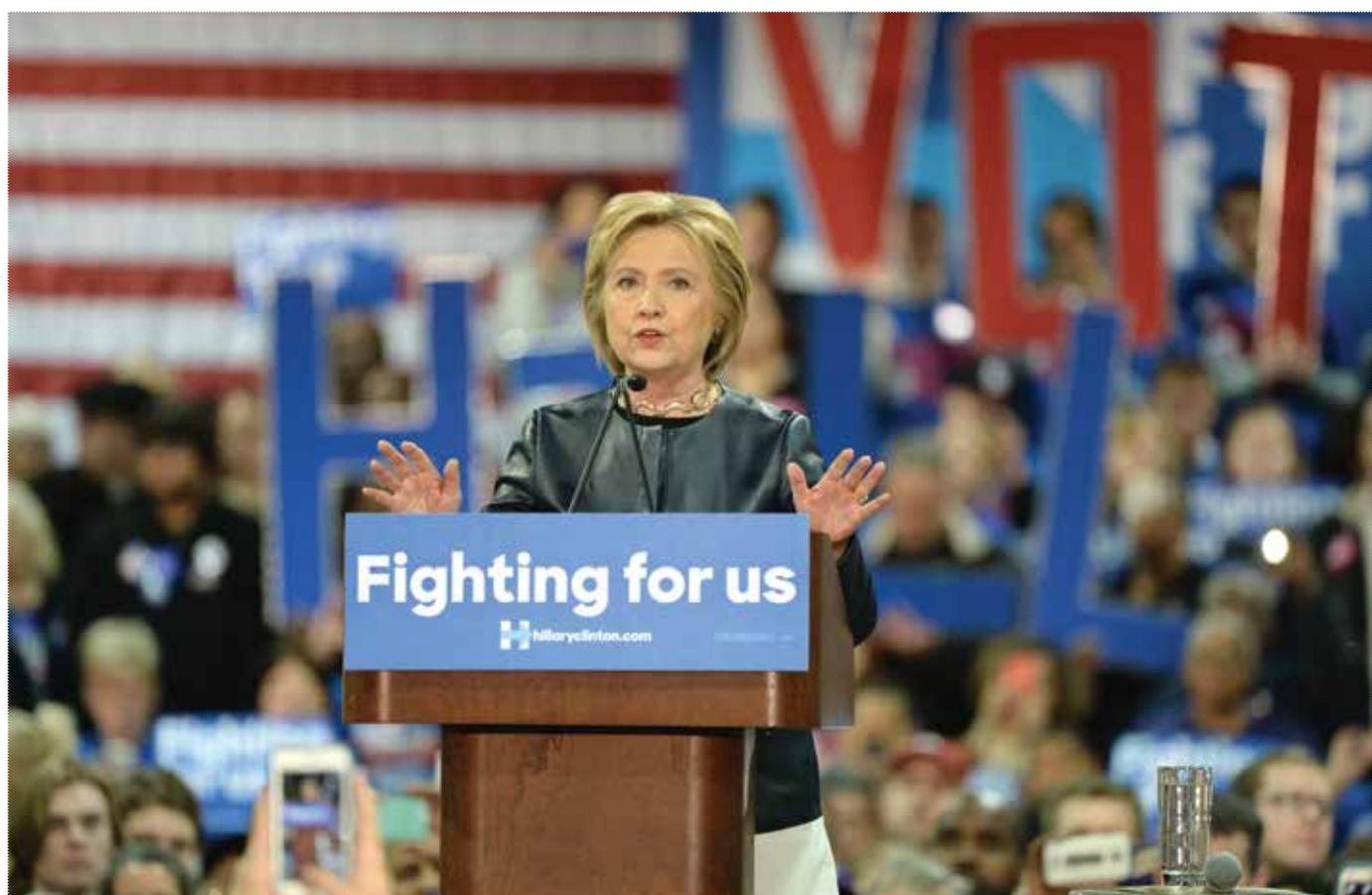


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Right is right, left is left, now the twain have met

His Democratic opponent, Hillary Clinton, talked a good game, but there was little indication that her antitrust programme would diverge significantly from her predecessor's.

In an October speech in Ohio – a swing state she ultimately lost by a surprisingly large margin – Clinton vowed to “appoint tough, independent authorities to strengthen antitrust enforcement and really scrutinise mergers and acquisitions, so the big don't keep getting bigger and bigger”. She moved on to her proposals for tax credits for companies to share profits and hire American workers – a stronger applause line in Toledo than anything she had said about consolidation.

Clinton's campaign quickly issued a list of specifics for her “new commitment” to promote competition, address excessive concentration and the abuse of economic power, and reinvigorate antitrust enforcement. But they mostly mirrored the promises made, and to some extent fulfilled, by President Barack Obama.

Until its final year, the Obama administration rarely connected competition

enforcement and economic inequality. Typical of its response were remarks by the head of the Federal Trade Commission's (FTC) bureau of competition, Debbie Feinstein, at the American Bar Association's annual antitrust masters conference at the end of September 2016. Speaking at lunch, she called it “a little simplistic” to see increased consolidation at the national level as necessarily harmful. The FTC's analysis is at the level of specific geographic and product markets, Feinstein said, and “one of the things that we often learn is that the conventional wisdom isn't always true” about the direction of competition in an industry.

Instead, the calls for revolution came from Clinton's main opponents in both the Democratic primaries and the general election. Senator Bernie Sanders reflected a push from the more liberal wing of the Democratic party to use antitrust enforcement as a means of fighting inequality. Meanwhile, Trump capitalised on discontent among Americans who feel left out of the benefits of disruptive innovation and competition, and burdened by changes to their communities.

Both men reject the consensus view among experts on trade regulation, who say that competition domestically and from foreign producers is good for the US, and that any negative effects should be combated through other policies such as subsidies and job retraining, not by changing the antitrust agencies' current analytical framework.

Sanders' leftism and Trump's populism coincided in an anti-establishment critique of free trade and corporate power that reached its apex in late October, when they separately declared – prior to any antitrust agency review – that a vertical deal should be blocked.

Two weeks before voters were set to go to the polls, telecommunications giant AT&T said it would buy television and film conglomerate Time Warner. Within hours of the announcement, Trump gave a speech about corruption in American institutions that he said included the mainstream media.

“They're trying desperately to suppress my vote, and the voice of the American people. As an example of the power structure I'm fighting, AT&T is buying Time Warner and thus CNN – a deal we will not approve in

my administration because it's too much concentration of power in the hands of too few." The audience at his rally in Gettysburg, Pennsylvania, cheered.

He continued with a criticism he previously had made of Amazon, whose founder Jeff Bezos owns *The Washington Post*, for not paying enough in taxes – “It's a very unfair playing field, and you see what that's happening and what that's doing to department stores all over the country,” Trump said of the online retailer's effect on brick-and-mortar rivals. He had previously called Amazon a monopolist with “a huge antitrust problem”, and in June, his campaign had defended the revocation of the *Post's* press credentials partly on the grounds that the newspaper was being used by Amazon as a “political lobbyist” to avoid being “sued for monopolistic tendencies that have led to the destruction of department stores and the retail industry”.

Trump then took on the 2011 merger of cable and internet provider Comcast and the television and film conglomerate NBCUniversal, which “concentrates far too much power in one massive entity that is trying to tell the voters what to think and what to do. Deals like this destroy democracy, and we'll look at breaking that deal up and other deals like that. This should never ever have been approved in the first place. They're trying to poison the mind of the American voter.” After another round of applause, he moved on to his standard themes of an establishment that was taking away his supporters' jobs, security, education, healthcare, religious liberty, gun rights, factories and homes.

His campaign followed up the next day with a “statement on monopoly power of new media conglomerates”, attributed to Trump's senior economic adviser, University of California at Irvine professor Peter Navarro. It likened the candidate to the original trust buster, Teddy Roosevelt; as that Republican president had broken up the oil, rail and steel monopolies, Trump promised to “break up the new media conglomerate oligopolies that have gained enormous control over our information, intrude into our personal lives, and in this election, are attempting to unduly influence America's political process.”

Mixing criticism of concentration, free trade and traditional news media, Navarro bashed NBC's old owner General Electric, Comcast, Mexican billionaire and *The New York Times'* largest shareholder Carlos Slim, and Amazon. “Lower costs mean higher margins – no matter if bad trade deals lead



to massive unemployment in America. This oligopolistic realignment of the American media along ideological and corporate lines is destroying an American democracy that depends on a free flow of information and freedom of thought,” Trump's adviser said.

While Clinton, her running mate and other elected officials called for a Congressional hearing into *AT&T/Time Warner* and said the antitrust agencies should closely scrutinise the deal, they did not judge it immediately as unacceptable. Senator Elizabeth Warren in June had given a much-noted speech criticising the enforcers for allowing mergers based on remedies, and telling them to apply the same scepticism to vertical tie-ups as to horizontal ones. But even she said only that “regulators should take a very, very close look” at AT&T's acquisition of Time Warner.

The exception to this measured response from the political class was Sanders, who had been Clinton's rival in a long-fought Democratic Party primary. He promptly

“AT&T is buying Time Warner and thus CNN – a deal we will not approve in my administration because it's too much concentration of power in the hands of too few”

– Donald Trump

said the Obama administration “should kill the *Time Warner/AT&T* merger” as it would result in higher prices and fewer choices, and expanded on that view a few days later in a letter to the acting assistant attorney general for antitrust, Renata Hesse. Countering the assumption that vertical mergers are less problematic, Sanders said

that “when one giant company owns both the content and the means of distribution, there is a clear disincentive to provide additional choices to consumers.”

Unlike Trump’s remark about *Comcast/NBCUniversal*, Sanders did not suggest undoing a previous merger, but he emphasised the lack of consumer benefits from

AT&T’s 2015 acquisition of DirecTV. AT&T raised prices for both its U-Verse internet-based TV service and DirecTV satellite TV service, he said, and discriminated in favour of DirecTV’s streaming video by exempting it from data caps on AT&T’s mobile data service.

Battle with the experts

The senator’s letter also pointed Hesse back to her own words: “As you noted recently when speaking about the corrosive effects of antitrust, ‘when companies harm competition – choking off competition or agreeing with rivals not to compete – they infect the economy with unfairness by accumulating power that the few can wield at the expense of the broader American public.’”

Sanders was quoting a keynote speech that the head of the Antitrust Division had given a month earlier at Georgetown Law Center. Titled “And never the twain shall meet? Connecting popular and professional visions of antitrust enforcement,” the speech acknowledged increased non-specialist interest in competition law, as well as “some tension between the views of the general public and the views of those who practice antitrust professionally”.

Hesse attributed the split between how experts and laypeople speak about antitrust largely to the influence of economics, but said the gap has been narrowed by the current enforcers’ willingness to litigate, which requires them to argue in terms convincing to a generalist judge. She criticised both those who want antitrust to combat ‘bigness’ and market concentration as measured simplistically, and those who would limit antitrust enforcement to instances of higher prices or lower output in downstream markets under the consumer welfare standard.

Despite its overall centrism, the speech raised eyebrows among some competition experts due to its reference to “the ultimate goal of antitrust, economic fairness.” Former FTC commissioner Joshua Wright tweeted: “Populism vs economics is an oldie but goodie in antitrust history, but the agencies have avoided it for good reason. Quite a speech.”

While observers have called Wright an antitrust “nihilist,” his criticisms of injecting populist views into antitrust economics



Joshua Wright speaking at the 2016 Conservative Political Action Conference (CPAC) in National Harbor, Maryland

PHOTO: WIKIMEDIA.COM/GAGE SKIDMORE

reflect the views of many in the antitrust community, including scholars who swayed the policies of the Obama Administration – none more than University of Iowa law professor Herbert Hovenkamp. In the 2006 edition of *Antitrust Law*, the classic textbook first published by longtime antitrust scholar Phillip Areeda, Hovenkamp cautioned against allowing populist goals to interfere with antitrust analysis: “interjection of populist goals, by broadening the proscriptions of business conduct, would multiply legal uncertainties and threaten inefficiencies not easily recognised or proved.”

Wright has declined interview requests since his role in the Trump antitrust transition became public, but wrote in *The New York Times* a week after the election that both presidential candidates had erred in saying “big is bad”. He argued that a high level of concentration does not necessarily mean the market lacks competition. In the absence of economic evidence for drastically changing merger policy, he said, critics had turned to political reasons: antitrust enforcement to reduce big companies’ political power,

leverage over wages, and contribution to income inequality. “Whatever the merits of these various policy goals, antitrust is an exceptionally poor tool to use to achieve them,” Wright wrote. “Economic analysis has more often than not trumped ideological politics in antitrust policy for the past 35 years. Let’s keep it that way.”

In a paper forthcoming in the *Antitrust Source*, antitrust scholars Steven Salop and Carl Shapiro suggest that the Trump antitrust agencies would indeed reflect Wright’s preference for less enforcement, rather than Trump’s campaign trail proclamations suggesting he’d be willing to use antitrust enforcement to rein in corporate power.

In the paper, Salop and Shapiro say antitrust enforcement under Trump appears headed in one of two quite different directions: an interventionist track that reflects Trump’s criticisms of media industry consolidation and Amazon’s market power, and a laissez-faire track that would be more in line with traditional Republican distaste for government meddling in the market. Since the election, the paper says,

signals from the Trump camp have raised expectations for familiar, small-government policies that shun populist influence. “This does not mean every single policy decision will be the laissez-faire choice and none will be reining in, but right now we expect that the mix will tilt heavily in that direction,” the authors write.

Salop and Shapiro point out that the laissez-faire approach is likely not what working-class Trump voters were hoping for, given the popular media narrative that Trump was carried into office on a rising wave of populism that shunned corporate power and big business consolidation. While there is truth to that narrative, many Trump voters were solidly middle-class, and American suburbs remained hotbeds of Republican support, from the top of the ticket on down. Those are precisely the voters whose loyalty has been solidified by small-government and low-tax Republican pledges and policies over the past 30 years. Trump should be hesitant to upend those policies and risk losing that base of support. That will likely extend to the administration’s approach to antitrust enforcement as well; indeed, the president-elect’s cabinet choices and small-government pledges since the election reflect an apparent departure from his populist campaign rhetoric.

The Trump administration could mix such small-government policies with “the potential for the abusive use of antitrust to further the political or economic interest of the President and his allies,” Salop and Shapiro write. There has been evidence,

even before the inauguration, that Trump is willing to use the power of the government to affect markets. In negotiations with Carrier, the US-based heating and cooling appliance manufacturer, Trump threatened to cancel the company’s government contracts if it moved certain jobs to Mexico, as it had planned. The concern, Shapiro and Salop write, is that the negotiations were handled in an ad hoc way based on specific threats, rather than as a legislative rule or an executive order that would bar companies that offshore jobs from receiving government contracts.

When applied to antitrust law, the authors suggest Trump could use “government antitrust enforcement to frighten or punish corporations or individuals that are seen as enemies of the administration, or to reward its friends”.

The paper points out that most of Trump’s populist-leaning enforcement threats on the campaign trail have perhaps been based on wholly non-antitrust concerns. His pledge to block *AT&T/Time Warner* could be seen as an attack on CNN, a Time Warner channel that he views as an enemy of his agenda, while Amazon founder Jeff Bezos’ ownership of the often-critical *The Washington Post* fuelled Trump’s suggestion that Amazon may face antitrust enforcement under his administration.

However, it is difficult to predict the degree of influence that Wright and another transition adviser, Hunton & Williams partner David Higbee, will have on the Trump administration’s antitrust policy.

“Populism vs economics is an oldie but goodie in antitrust history, but the agencies have avoided it for good reason”

– Joshua Wright

A former senior adviser to the Trump campaign, Barry Bennett, warned a month after the election that the new president “lives at the intersection of libertarianism and populism,” and that transition team members without that blend of philosophies may not represent their boss’s views. Bennett added that Trump’s statements during the campaign of opposition to the *AT&T/Time Warner* and *Comcast/NBCUniversal* mergers are likely to be Trump’s real sentiments.

Populism, then and now

There has always been some perceived, perhaps sentimental, link between the populism pervasive in late 19th and early 20th century America and the antitrust laws. Theodore Roosevelt was the first US president to vigorously enforce the Sherman Antitrust Act – a law, enacted in 1890, that itself smacked of the populist sentiments of the era. And Roosevelt’s booming rhetoric against corporate power and influence over government in part mirrored that of his Republican rival and presidential successor, Woodrow Wilson, who favoured antitrust reform and eventually introduced the Federal Trade Commission (FTC) and Clayton Acts to counteract the post-Sherman Act merger wave of the early 1900s.

Until the 1970s, when multiple US political, economic and legal institutions began rolling back government influence over markets, populist principles peppered antitrust enforcement just as they did wider economic policies. Court decisions repeatedly favoured diverse markets over concentrated ones, and a generally liberal Supreme Court issued decisions, such as its 1963 decision in *Philadelphia National Bank*, that reinforced congressional concerns with rising levels of corporate concentration and power. As former FTC chairman Robert Pitofsky wrote in a 2005 examination of the agency’s history: “In the 1960s, emphasis was on populist values, hostility to ‘Bigness,’ protection of competitors as opposed to the competitive

process, and neglect or outright hostility toward efficiencies.”

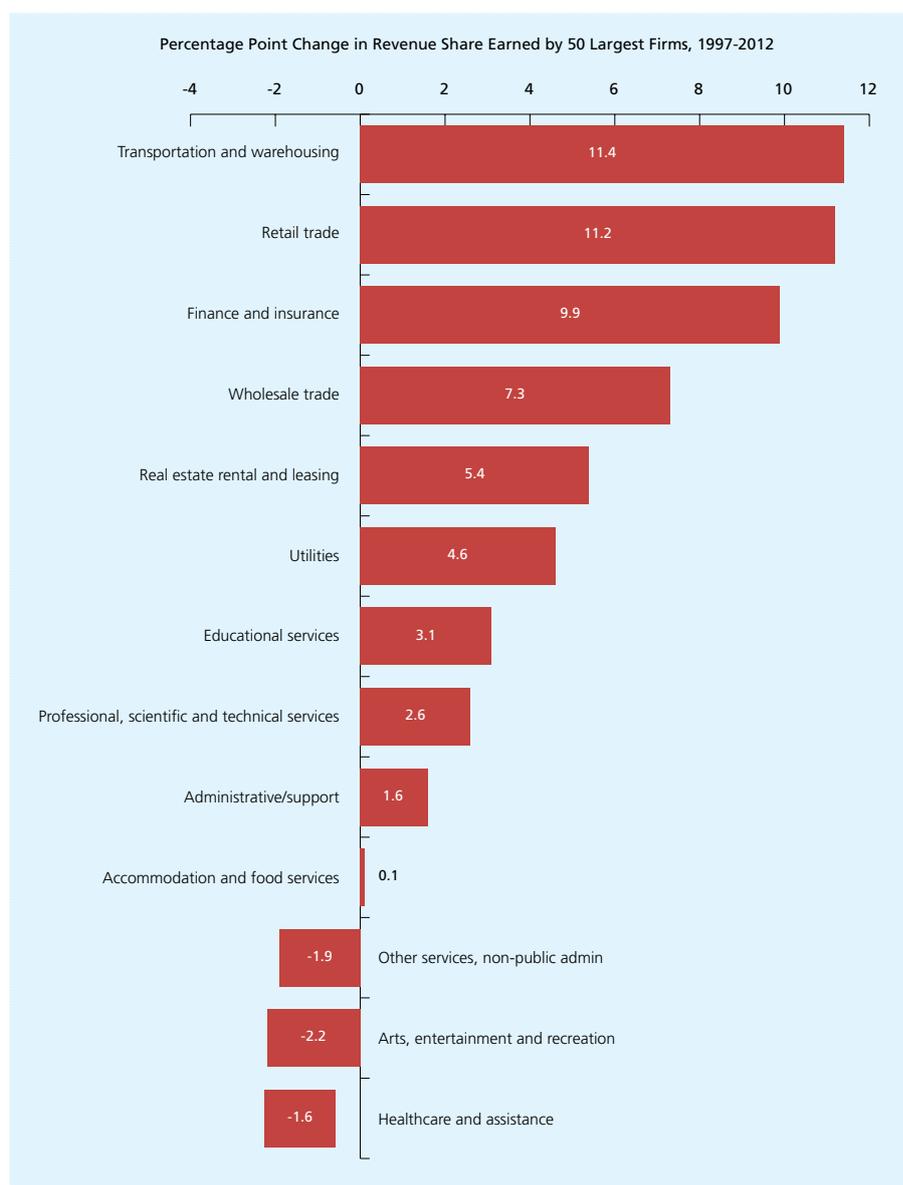
Those 1960s values Pitofsky listed are, to some extent, woven into the fabric of the antitrust laws. A core principle of populism, as it is commonly understood, is that working people should have at least some countervailing market power with which to offset the growing power and wealth of big corporations and their top management. A White House Council of Economic Advisers report issued in April 2016 – coupled with a presidential order directing federal agencies beyond the FTC and DOJ to look for ways to bolster competition – attributed growing income and wealth inequality in America over the past quarter-century largely to

companies returning higher profits to investors and executives while workers' wages remain flat.

This rent-seeking behaviour – where companies use their market power to raise prices or cut services in order to extract more wealth from the economy – is a common target of antitrust enforcers. Top officials at the DOJ's antitrust division have for the past two decades or more identified rent-seeking behaviour as a problematic side-effect of a lack of competition – and something that enforcement could and should help to correct.

Indeed, it is worth asking whether the most recent incarnation of the Obama DOJ displayed these populist tendencies. Rent-seeking behaviour was clearly an issue officials took seriously and saw as something that vigorous merger enforcement could prevent. Enforcers at both antitrust agencies viewed claims of efficiencies springing from mega-mergers with as much scepticism as any administration for a generation or more.

Two weeks before the election, the DOJ announced it would criminally investigate future allegations that employers have made wage-fixing or anti-poaching agreements that would reduce their competition for each other's workers. Previously, the DOJ had civilly pursued agreements to pay nurses more than a certain amount, or not to attempt to lure away Silicon Valley engineers to a different company. The Obama administration framed this change in policy as part of a programme to spur competition in the labour market and counteract stagnant wages.



Too little, too late, too liberal?

Nonetheless, the fundamental position among the Obama administration's competition enforcers – sometimes contrary to those who otherwise are ideological allies – has been that the problem of inequality is not an antitrust problem. They have instead voiced a classical liberal reluctance to interfere with markets that are functioning efficiently.

At an October conference hosted by the Washington Center for Equitable Growth, representatives of left-leaning think tanks such as the Center for American Progress and the New America Foundation criticised the DOJ and FTC for failing to do enough to block anticompetitive mergers and address large employers' monopoly power over workers. Meanwhile, those with experience

in the Obama administration – former Antitrust Division deputy for economics Fiona Scott-Morton and former FTC chief economist Martin Gaynor – persisted in saying that antitrust enforcement is not the place to look for reductions in inequality.

“I am dubious that the two, market power and inequality, are strongly linked,” Gaynor said, adding that research points to technological change as the primary driver of growing inequality in the US. Current FTC commissioner Terrell McSweeney, a Democratic appointee, reiterated the Council of Economic Advisers' concern that rising economic rents may be a factor in rising income inequality, and said the conventional wisdom that mergers lead to

Job loss is “a big, big issue but not an antitrust issue”

– Renata Hesse

Americas

efficiencies may be suspect, but suggested no new direction for enforcement.

At the same September ABA conference where Feinstein had said heightened concentration at the national level may not be bad, Hesse was asked what antitrust policy questions she would like to see addressed. “I have a big policy question that I think about a lot which is not really an antitrust one, but I do worry about it a lot,” the Antitrust Division chief said. Notwithstanding her love for technology, such as online restaurant reservation systems, Hesse said every innovation that reduces transaction costs “eliminates a job”, creating a huge transition for the US economy. “That’s a big, big issue but not an antitrust issue.”

These scrupulous separations of antitrust policy from what might address populist fears of lost jobs may weigh less heavily on the Trump administration. For example, merging companies often tout the ability to reduce their combined workforce as a pro-competitive efficiency of the tie-up – but this

is unlikely to be a selling point to a president eager to credit himself as saving and creating jobs in the US.

The inclusion of employment protections in merger conditions has precedence in other jurisdictions, such as South Africa, and has been suggested by UK prime minister Theresa May as part of the “public interest” element of deal review. In the US, Congress would have to change the law to make job protection an explicit part of how the government considers mergers, whether by giving the antitrust authorities such a public interest element in their reviews or by empowering another agency to do so. In the absence of a new law, US courts are unlikely to grant injunctions against mergers based on non-competition arguments by the DOJ and FTC.

However, the agencies may not have to win in court to win concessions from companies desperate to get a deal done. The mere threat of an antitrust challenge has sunk many a merger, and Trump has business experience

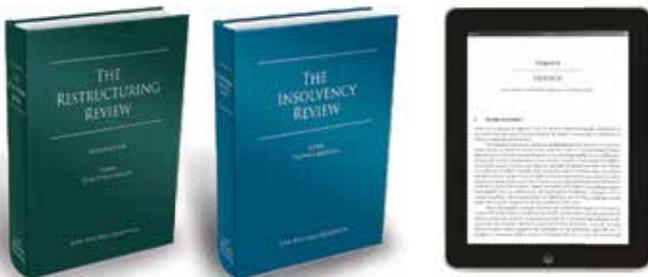
in using the threat of litigation to push for his preferred outcome.

It might seem ironic if the Antitrust Division and FTC did so under his direction, given that other Republican politicians have complained about “a temptation for antitrust regulators sometimes to impose conditions [on mergers] that don’t involve anticompetitive concerns”. Those were the words of Senate antitrust subcommittee chairman Mike Lee at the confirmation hearing for Jeff Sessions to become head of the DOJ. Sessions agreed that “it would be wrong to further some other separate discrete agenda that is not reasonably connected to the merger itself.”

Yet when one remembers how Trump reached the White House – through direct appeals to voters, and in defiance of the Republican establishment – a willingness to break with bipartisan antitrust tradition to achieve his goals would be no surprise at all. **GCR**

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