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Expert Analysis

'A Better Deal' on Antitrust Enforcement: Can Democrats Catch the Populist Wave?

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These are interesting times. Promises to enforce laws as written and interpreted for decades may no longer do the political trick. Hence, even though the Democrats controlled Congress for a portion of the eight-year Obama administration, there was no meaningful proposal to re-write the antitrust laws to make big "bad" once again, to regulate the pricing of lawful monopolists, or to use the antitrust laws as a tool for social and economic engineering, harkening back to the trust-busting days of old. But the 2018 midterm elections beckon, and Congressional Democrats do not want to miss the populist wave a second time. So, on July 24th, they unveiled a suite of new legislative proposals, collectively called "A Better Deal," which includes a statement titled "Cracking down on Corporate Monopolies and the Abuse of Economic and Political Power" (the Statement).[1] Certainly these new statutes, which are quite radical in terms of reversing decades of antitrust jurisprudence, are not proposals for today. But they are markers for future political battles and promises, and for that reason should be taken seriously and tracked.

'A Better Deal' for Antitrust

The Statement argues that lax enforcement of the antitrust laws have allowed large corporations to get larger, leading to higher daily expenses such as airfare, cable, eyewear, food and beverage, reduced wages and bargaining power for workers, and concentrated political power of large corporations. The Statement declares an intent to reframe the antitrust laws to "ensure that the economic freedom of all Americans—consumers, workers, and small businesses—come before big corporations that are getting even bigger." By ascribing such lofty goals to the antitrust laws, the Statement marks a substantial departure from the long-standing consensus regarding the role of the antitrust laws—protecting the competitive process for the promotion of consumer welfare—but otherwise not picking winners and losers in the rough and tumble of the marketplace.

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The Statement makes three specific proposals. *First*, it lays out new standards to limit large mergers that unfairly consolidate corporate power. One aspect of the new standards expands the beneficiary of the antitrust laws' protection from consumers to workers, suppliers, and competitors. In scrutinizing mergers, antitrust regulators would be required to take on a broader, longer-term view that considers—beyond short-term effects on price and output—whether mergers "reduce wages, cut jobs, lower product quality, limit access to services, stifle innovation, or hinder the ability of small businesses and entrepreneurs to compete." Another aspect of the new standards endorses stronger presumptions that market concentration can be anticompetitive. Under this standard, "the

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largest mergers would be presumed to be anticompetitive and would be blocked unless the merging firms could establish the benefits of the deal." The upshot of this presumption is to shift the burden of proving the competitive effect of consolidation from antitrust regulators to the merging firms.

Second, the Statement proposes requiring frequent, independent post-merger reviews of businesses that were allowed to merge subject to terms and conditions. The purpose is to monitor whether the terms and conditions the merged companies agreed to are being met. If they are not, regulators would be empowered and required to take corrective measures against the companies.

Third, the Statement proposes a new competition advocate, a "Trust Buster," that "would research current market activity, receive consumer complaints, and proactively recommend competition investigations" to the Federal Trade Commission (the FTC) and the Department of Justice Antitrust Division (the Division) (collectively, the Agencies). To inform and facilitate the involvement of the public through the advocate, data on market concentration and abuses of economic power, and the advocate's recommendations would be made public. And to ensure that these recommendations are taken seriously, the Agencies would be required to publicly justify if they choose not to pursue a recommended investigation.

A Departure, to Say the Least

The Statement's recommendations contrast sharply with over half a century of antitrust laws as well as the more recent stated recommendations of the Section of Antitrust Law of the American Bar Association (the Section) concerning antitrust enforcement agencies. The Section earlier this year published a report outlining its views regarding the current state of federal antitrust enforcement and its recommendations for the new administration.[2] The report makes several recommendations that directly contrast with the Statement.

In line with the mainstream view of the antitrust laws as a "consumer welfare prescription,"[3] the Section comments that "the combination of higher prices and reduced output" is the proxy by which to conclude a merger is anticompetitive. This exclusive concern with the economic effect on consumers contrasts with the Statement's inclusion of social and political goals in the antitrust laws and enforcement that, among other things, would have regulators assess whether a merger reduces wages, cuts jobs or hinders the ability of small businesses and entrepreneurs to compete.[4] In the context of recommending retrospective studies of past merger enforcement decisions, the Section recommends that beyond price and output, such studies should also analyze a merger's effect on innovation and the behavior of firms. But the purpose of such studies contrasts with the purpose expressed in the Statement. The Section recommends retrospective studies—which the FTC has already done from time to time—as a means to enhance transparency and evaluate the effectiveness of merger policy, remedies, and tools and models used to evaluate mergers. On the other hand, the Statement proposes post-merger reviews as a method of ongoing monitoring and regulation of businesses that have been allowed to merge subject to certain terms and conditions. Another contrast pertains to the purpose of making statements and information available to the public. The Section recommends that the Agencies make greater use of Competitive Impact Statements and Aids to Analysis of Public Comment, and issue more frequent closing statements for those merger investigations not resulting in agency action, to further enhance transparency. In contrast, the Statement proposes making pertinent data and the competition advocate's recommendations public to facilitate greater involvement of the public and to hold regulators accountable. As the Statement asserts, the reason for this proposal is that "antitrust regulators have been unable or unwilling to pursue complaints about anticompetitive conduct."

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In considering the Statement, it is fair to recognize that the Statement's objectives—and their eschewing of the goals of protecting consumer welfare—would also be a reversal of the Obama administration's enforcement policies over the past eight years. For example, at a 2016 Senate Judiciary subcommittee hearing on antitrust oversight, then-Assistant Attorney General of the Division Bill Baer stressed the Division's commitment to challenging mergers to "protect U.S. consumers from threats to competition."[5] Baer then highlighted some of the Division's merger challenges: Electrolux/GE Appliances, Anheuser-Busch InBev/Grupo Modelo, Comcast/Time Warner, National CineMedia/Screenvision, AT&T/T-Mobile, and Tokyo Electron/Applied Materials. At another 2016 hearing on oversight of the FTC, the Commission underscored its willingness to challenge and if necessary go to court to "prevent mergers that are likely to reduce competition and

result in higher prices, reduced quality, or less innovation."[6] The Commission's testimony recounted that since the start of fiscal year 2015 to the date of the testimony, the Commission had challenged 44 mergers, sued to block 8 mergers, and obtained trial victories stopping both the Sysco/US Foods and Staples/Office Depot mergers. Presumably, had Hilary Clinton won the presidency, these same enforcement objectives and approaches would have carried forward.

Observations

But these are more interesting times, and politicians on both sides of the aisle are trying to identify and capture the hearts of voters who are not necessarily wedded to traditional party platforms and policies. In this light, the Statement can be seen as the Congressional Democrats' stark attempt to embrace a populist conception of economic regulation that is a major departure from the well-established principles of antitrust law, including in the area of public enforcement by the Agencies. Since the late 1970s, the U.S. antitrust community of practitioners, judges and professors have coalesced around the basic premise that the goal of the antitrust laws is to protect and promote consumer welfare, and the more recent trend is to rely on fact-based economic analysis, rather than mere theoretical constructs, to achieve those objectives. The Statement does not begin to suggest how the welfare effects on consumers can be squared with the Statement's overt populist and political objectives.

However implemented, there is no doubt that the Statement would require nothing less than a reworking of our antitrust laws, which in turn certainly could affect the historical results—assuming some causal connection—that the consumer welfare model has achieved in terms of innovation and global leadership. And while it is unclear from the Statement, alone, whether Congressional Democrats have a blueprint for dealing with the decades of antitrust jurisprudence (or whether this is all mere rhetoric), there are some teeth to other parts of the platform. For example, the Statement is paired with an equally aspirational statement entitled "Lowering the Cost of Prescription Drugs,"[7] which together forms one of "A Better Deal"'s goals to "lower the costs of living for families." That statement singles out the perceived problem of price increases for certain prescription drugs, an issue that has garnered much public attention. While the statement does not directly attack the notion of "price gouging" as an antitrust issue or call on the Agencies to take action, it does propose the creation of a new "price gouging" enforcer. Enforcers would be charged with identifying drugs that have "unconscionable" price increase and impose fines on the manufacturer. The legal mechanism of enforcement is not spelled out; and the appeal to "unconscionable" pricing is evocative of the "abuse of dominance" pricing standards in EU competition law,[8] something distinctly absent from the U.S. antitrust laws, that historically permit firms, including "monopolists," to price their product as they choose absent independent "exclusionary" conduct. Indeed, the *Trinko* court highlighted the procompetitive benefits of monopoly profits as the prize that drives the incentive to invest and innovate in the first place,[9] an approach certainly not embraced by our European counterparts.

No doubt the Statement is a long play—a piece of the puzzle of the 2018 mid-term Democratic election strategy and who knows what thereafter. Perhaps the real message, then, is that in today's political environment, nothing is sacred, including the consumer welfare model of antitrust. Yet this is one of the things that makes our system of politics and law-making so interesting and our freedoms so precious. In the face of what may be perceived as decades of antitrust common law built around a consumer welfare paradigm, new statutes are the ultimate trump card, and the Democrats appear ready and willing to play them. Stay tuned.

1. Nancy Pelosi, "Cracking down on Corporate Monopolies and the Abuse of Economic and Political Power" (July 24, 2017).

2. American Bar Association Section of Antitrust Law, Presidential Transition Report: The State of Antitrust Enforcement, (Jan. 24, 2017).

3. Joshua D. Wright and Douglas H. Ginsburg, "The Goals of Antitrust: Welfare Trumps Choice," 81 Fordham L. Rev. 2405, 2406 (2013) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)).

4. On the other hand, the Section in one instance explicitly distinguishes between an anticompetitive effect on competition itself and on individual competitors, implying that only the former is a concern of the antitrust laws.

5. Statement of Bill Baer, Assistant Attorney General, Antitrust Division, Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights Committee on the Judiciary United States Senate, Hearing on Oversight of the Enforcement of the Antitrust Laws (March 9, 2016).

6. Edith Ramirez, Maureen K. Ohlhausen, and Terrell McSweeny, Prepared Statement of the Federal Trade Commission on Oversight of the Federal Trade Commission, Before the Committee on Commerce, Science, and Transportation, U.S. Senate (Sept. 27, 2016).

7. Nancy Pelosi, "Lowering the Cost of Prescription Drugs" (July 24, 2017).

8. Article 102 of the Treaty of the Functioning of the EU prohibits the abuse of dominant market positions.

9. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398, 406-07 (2004).