Antitrust In Transition: Points To Watch

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The world hungers to know whether the Trump administration will be bold and Reaganesque—unafraid to make substantial policy corrections that are sound but possibly unpopular (pending the delivery of results)—or something else. Ronald Reagan, labeled the "amiable dunce" by Democratic heavyweight Clark Clifford, reestablished the U.S. as a technology powerhouse and threw Communism off the world stage, shortlisting him for greatest U.S. President of the 20th century. Donald Trump's doubters are no less derisive than Reagan's.

In this essay, I offer thoughts on four key points that would signal President Trump's odds of becoming a successful policy innovator on a level with Reagan. I also offer some comments in response to the article in this issue of the *Source* by Steven Salop and Carl Shapiro, which, their comments notwithstanding, does not in my view suggest any realistic threat that protecting capitalism will bring an end to our democracy.

1. Clarity, Quality, and Speed of First Steps

A strong start matters—in its own right, and in paving the way for continuing policy innovations. Reagan quickly proved his ability to target bad policies by expunging a few instanter, signing necessary papers en route from the inauguration stand to the inaugural luncheon in the Capitol. He also had his team ready and waiting when the doors opened: in a month William F. Baxter was running the Antitrust Division and starting to deliver specific initiatives—most memorably, the principle that "if it doesn't make economic sense, it doesn't happen." Watch whether President Trump can quickly locate and place senior officials to shape antitrust to his key goals.

2. Sorting Out the International Antitrust Tangle

Global antitrust activity has been mushrooming for decades. Once confined to the U.S. and a small handful of other jurisdictions, antitrust laws are now actively enforced in over 130 jurisdictions worldwide, creating frequent overlaps, conflicts, and huge increases in compliance costs. In many jurisdictions shadowy procedures allow industrial policy and questionable economics to masquerade as antitrust enforcement. The ongoing EU effort to extract $14.5 billion from Apple is only one example of many that have arisen in a variety of Asian, European, and other jurisdictions. The global enforcement bureaucracy has grown enormous, labyrinthine, and resistant to significant reforms needed to reduce costs and banish anti-growth goals. No U.S. President has yet recognized the need or assembled the means to coordinate U.S. policy on international antitrust, though this is essential to prune the wildest strands of the worldwide overgrowth. Watch whether President Trump becomes the first.

3. Modernizing U.S. Enforcement

The strains of a U.S. enforcement system built for long-extinct conditions call out for modernization. Created in 1914, the FTC received the ill-defined mandate to prevent "unfair methods of com-

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petition," free from both Presidential oversight and focused judicial review. This combination of a vague mandate and frail checks and balances has proven troublesome. The FTC needs better accountability, more disciplined procedures and a specific structure to harmonize its actions with those of the Antitrust Division. The SMARTER Act and the 2015 "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition'" are worthwhile starting points. Watch whether President Trump picks up these initiatives and moves ahead.

4. Reducing the Burden of Merger Review

U.S. merger review under the Hart-Scott-Rodino Act is justly reputed to be the most costly form of merger review in the world. It has become a poster child for agency "mission creep" and crushing procedural burdens. Over 1,800 transactions required notification in FY 2015, but only a small fraction needed any serious review. The burdens of the HSR process—agency demands for massive document searches, for example—sometimes reach levels that invite parody. Watch whether new agency leadership and the new administration can design and implement ways to limit the number of filings, narrow the focus of investigations, and regulate the process to standardize key practices and reduce cost, delay, and other burdens.

5. A Note Regarding Capitalism and Democracy

In their contribution to this issue of the *Source*, Professors Salop and Shapiro craft an entertaining hodgepodge of wild scenarios: the advent of "crony capitalism," "threats to democracy," and other ultimate-destruction-of-the-Universe consequences for antitrust in the Trump administration. It is tempting to consider responding by "riffing"—sarcastic jibes thrown out loud by an audience at particularly embarrassing scenes in a bad movie, like the playful robots and their creator, the space-marooned janitor Joel Robinson of "Mystery Science Theater 3000."

Professors Salop and Shapiro's violent lurch between predictions of an antitrust review standard that would consider no behavior to be competitively harmful (on the "Triumph of the 1%" end of the spectrum) to a standard that would balance (in some unspecified way) microeconomic analysis with interests of "working class consumers" or what Justice William O. Douglas referred to as the "glories of Goldendale" (i.e., small-town values) in his *Falstaff* concurrence,[1] reminded me of the old joke about the "Henry Kissinger Options Memo," which goes as follows: It is the Nixon administration and the Cold War is at its most intense. The Soviet Union makes an outrageous territorial demand, backed by a belligerent threat. Nixon tasks Dr. Kissinger to request suggested policy responses from his staff and from the other senior military and diplomatic advisers in the White House. Using his legendary intellect and knowledge of historical precedents, Kissinger considers all the suggested possibilities carefully and solemnly offers President Nixon the following options: (1) total capitulation, likely to result in a Soviet takeover of the world; (2) resolute defiance, likely to result in global thermonuclear war and the end of life on Earth, or (3) the solution recommended by Dr. Kissinger.

It's not hard to find option (3) in the Salop-Shapiro piece—bigger FTC/DOJ budgets, fidelity to microeconomic analysis with more skepticism toward horizontal mergers, plus enhancements to the type of merger relief that has become standard in recent enforcement practice. It is the antitrust professional's Kissinger Memo, pleading for more use of the services of antitrust professionals. This strikes me as a good occasion to listen—in a calm and relaxed setting—to Shirley Bassey's fabulous rendition of "History Repeating."

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[1] United States. v. Falstaff Brewing Corp., 410 U.S. 526, 543 (1973) (Douglas, J., concurring).

The most persuasive antitrust analyses are closely tethered to empirically tested conjectures based on simple and compelling predictions that flow from the attribution of self-interest to all key actors in the competitive domain under examination. James Buchanan, Ronald Coase, and Gordon Tullock showed persuasively how the great explanatory utility of those elements was reaffirmed and improved by including institutional or even political elements in the analysis. As in other areas of applied microeconomic analysis, modeling and empirical verification are admittedly difficult in many aspects of antitrust enforcement. When an enforcement official states that "I think the intuition behind antitrust economics is that all mergers cause harm"—as Obama's last Acting AAG for Antitrust did a few weeks ago[2]—it should remind us *that real antitrust analysis is actually hard work*. Enforcement efforts of the future should not be based on fears of "complete capitulation" or "global thermonuclear war," nor on any of the many other verbal sedatives frequently offered to distract us from the serious business of guiding the structure of the economy by forcing changes in competitive conduct. ●

[2] Charles McConnell, *An Interview with Renata Hesse and Bill Baer*, GLOBAL COMPETITION REV. (Jan. 26, 2017).