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POST-ELECTION REACTION: EARLY THOUGHTS ON A NEW ANTITRUST REGIME

*On November 18, 2020, **The M&A Lawyer** spoke to Ryan Thomas and Jeremy Morrison, two partners in Jones Day's Washington D.C. office, on potential changes to U.S. antitrust policies in a Biden administration. Morrison is also a former FTC attorney (including serving as Counsel to the Director of the Bureau of Competition from 2013 to 2014).*

***The M&A Lawyer**: What are the major changes in 2021 going to be, on various fronts in antitrust?*

Jeremy Morrison: I think when you look at 2021, you should break it into two periods. In the short term, early- to mid-2021, we shouldn't expect to see a sea change at the DOJ or FTC. There's always a ramp-up period in a new administration, and the outcome of cases that have already been under investigation for a number of months may largely be baked.

In particular, for the FTC, there's going to be an interesting dynamic in that it could remain under Republican control until 2023 unless a Republican commissioner resigns. We're likely to have a new chair and new bureau management in 2021, but it is possible that there may not be significant change in the composition of the Commission for a while. In the ramp-up period, staff at both agencies are likely going to keep investigating deals as they always have and apply their well-worn analyses to transactions. The question becomes in the mid- to long-term, what are we going to see from Biden's appointments and where do they focus their attention.

I think there's a clear consensus that we are likely going to see increased enforcement. But there are a number of questions around that. How much and when do you start seeing that? Is that increase in enforcement going to be concentrated in certain industries, such as tech or pharma, and/or certain types of transactions, like innovation or killer acquisitions, where we've even seen some enforcement efforts under the Trump administration?

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Ryan Thomas: There's a fair amount of speculation about antitrust under Biden and what it's going to mean for companies. Observers are trying to make predictions, including based on the members of his transition team. For example, we know that Bill Baer and Gene Kimmelman are on Biden's agency transition teams. Bill Baer is on the FTC transition team. He was formerly head of the DOJ antitrust division. And Gene Kimmelman, who also formerly served at DOJ, is on the DOJ transition team. Both worked at the agency during the Obama administration. Since they're advising the Biden team, should we expect antitrust enforcement along the lines of what we saw during Obama's tenure? That's a reasonable baseline. But as Jeremy said, it's probably a matter of how much more aggressive enforcement we're going to have, not whether there's going to be more aggressive enforcement.

That said, when you talk about more or less aggressive enforcement from administration to administration, historically it has been on the margins. The agencies are confronted with hundreds of merger filings every year. At the end of the day, relatively few transactions—generally less than around 5% of reportable transactions—receive extended scrutiny in form of second request investigations, and a subset of those will end up requiring remedies, and an even smaller number of *that* subset will end up in actual litigation. So, for M&A, changes in enforcement across administration typically affect a handful of transactions.

Despite this history, there is some reason to believe this time around you might have incrementally greater enforcement. What do I mean by that? More aggressive and longer investigations. A greater willingness to investigate deals that might have been on the cusp—close calls—earlier, in terms of whether to conduct additional diligence through issuance of a second request or to push for remedies. A greater willingness to take "close" cases to court—threaten to litigate and follow through if the parties do not abandon the transaction. Coming full circle, it will be instructive to see who Biden nominates to head the DOJ antitrust division. At the FTC, he will likely elevate one of the existing

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Democrat commissioners to become chair, since this would not require Senate confirmation.

MAL: *It looks like the best-case scenario for a Biden administration would be very slender Democratic control of the Senate. Does that mean the more aggressive antitrust rhetoric we saw earlier this year, from Sen. Warren for example, is not going to translate into much, legislation-wise?*

Thomas**:** Even before this past election, there has been an evolution of increasing interest in antitrust enforcement, including among politicians. During President Obama's campaign, if memory serves, he had antitrust enforcement front and center from a policy perspective. Over the years, we've seen an increased focus on antitrust enforcement and what it means for various stakeholders—for customers, competitors, distributors, retailers, labor, and more generally from a societal perceptive. It's garnered a lot of attention in recent years in large part because of the focus on large tech companies. These online platforms have been in the antitrust crosshairs for years, and that attracts the public's and politicians' attention. So you have, for example, Senators Warren, Klobuchar, and Mike Lee all introducing various types of legislation trying to make antitrust more robust and effective.

As a practical matter, the Congress will be split during a Biden administration. Even assuming the Democrats did garner a majority in the Senate, it would be razor thin—and certainly not filibuster-proof if they wanted to push through antitrust legislation. In the near term, we should probably bet on no significant changes to antitrust law. However, there does seem to be bipartisan support to increase funding for both agencies. Remember: The DOJ and FTC are already busy right now based on their existing enforcement policies and case load. So if the Biden administration wants to substantially increase enforcement—more investigations, more litigated challenges—it will need more resources—more lawyers and economists—in order to fulfill that mission.

MAL: *Could a Biden antitrust regime have more and greater coordination with European merger regimes, as compared to the past four years?*

Morrison: At the staff level, there has still been coordination in transactions between the antitrust agencies in the U.S. and Europe. There could be more coordination between the U.S. and Europe in the next administration, but that may be less driven by personalities and more by a common outlook on antitrust and a more aggressive U.S. antitrust position going forward. That is, the U.S. agencies may more closely align with some of what we've seen in Europe in the past few years than they have in the past and that could naturally lead to the appearance of more coordination.

Thomas: Picking up on Jeremy's comments, we know that agencies in Europe, especially the EU Commission, the UK Competition Authority, have been more squarely focused on tech and online platform companies, with long investigations and fines. In the past couple of years the DOJ and FTC also have been pursuing these same companies more aggressively. So in this sense we're seeing a convergence between the U.S. and Europe.

More broadly, we're seeing increased attention by jurisdictions all around the world in a couple areas: competitive effects of large companies acquiring smaller ones (the "killer acquisitions"

Jeremy mentioned earlier) and revising merger filing thresholds to address potentially concerning transactions that, under the existing rules, fall just below the thresholds. A number of jurisdictions are asking whether they should have lower thresholds to catch these transactions so they can more easily investigate them before the parties are able to close.

That's Europe. Another interesting dynamic will be with respect to China, and how a Biden administration will approach China trade policy and any spillover effects in antitrust. This might affect certain transactions, especially tech deals, where the parties need to file and obtain clearance from SAMR, the State Administration for Market Regulation, the competition authority in China. Tech and other companies will be watching this closely.

MAL: *Are there types of mergers that may fall under greater scrutiny now—vertical mergers, for instance?*

Thomas: Vertical transactions to be sure, though again this might be more of an evolution than a revolution. In the Trump administration, the agencies focused more attention on vertical policy and transactions than in the past. This summer the DOJ and FTC released the first update to vertical merger guidelines since the 1980s. And, of course, the DOJ brought a high profile case against AT&T/Time Warner—the first vertical merger challenge in decades. The FTC, meanwhile, also investigated and reached settlements involving vertical deals. I would not be surprised if we see more investigations of vertical deals in the coming years.

Another area to watch are "potential competition" cases—transactions in which the merging parties are not current competitors but rather where one of the merging parties has plans to enter and compete in the other party's market. Or vice versa. If the deal goes forward, the agency might be concerned that customers will lose the benefit of that independent potential competition. The agencies have a longstanding practice of scrutinizing this dynamic in pharmaceutical deals. We also see it in other industries too—consumer goods, medical devices, etc. The agencies have focused increasing attention on this area in recent years and there is a good chance this will continue under Biden's nominees. It's closely related to killer acquisitions. Some of those deals might involve current competition. But many raise potential competition issues.

One additional point: A Biden DOJ and FTC might take an even harder look at consummated transactions, for example, in particular industries or by particular companies, say in the tech industry. The FTC, for example, has publicly announced investigations of past acquisitions by large technology companies, including Facebook. There is every reason to believe that a Biden administration will continue this work.

MAL: *Looking back at the Trump years, is it fair to say there was more continuity in antitrust enforcement than some had expected four years ago?*

Morrison: In part that's driven by the nature of reviews. These are very fact-intensive reviews, with a heavy reliance on staff, and there's a strong professional staff at both agencies. That's going to drive a lot of it. Perhaps that helps keep things a bit more even-keeled, so you didn't see the pendulum swing as far in antitrust as you might have in other policy areas under the Trump administration.

Thomas: I agree in the main that, with some exceptions, the Trump administration hewed closely to mainstream antitrust policy and practice. I'll highlight just a couple high-profile exceptions or surprises. It's not merger related, but last month the DOJ brought one of its most high-profile monopolization cases in years, and the DOJ's AT&T/Time Warner vertical challenge is notable because it was the first litigated vertical merger in 40 years. The government ultimately lost that case in court.

MAL: *Anything else to keep an eye on in the months ahead?*

Thomas: We've touched on this already. There has been greater scrutiny applied to larger companies, to firms with a "dominant" market position. In the M&A context, this always has been an important consideration, say if a large firm with a strong market position seeks to acquire a smaller rival. Most transactions are investigations (and in rare cases challenged in court) under the merger statute. There have been so far limited instances, however, in which the FTC and DOJ also attack the transaction under the monopolization statute. The recent DOJ compliant challenging the acquisition by Visa of Plaid is the most recent example. We might see the agencies employing this tactic more frequently in a Biden administration.

Morrison: Whoever is appointed at either agency is going to have pressure from the outside pushing for more robust antitrust enforcement. It will be interesting to see the impact that has on decision making and how much political pressure is put on the agencies to step up enforcement.

MAL: *Could that be a factor in pushing companies today to rush their mergers now, to get ahead of this?*

Morrison: It's possible—if you are considering a deal that you could do now or wait six months, you might be more inclined to do it now. But I don't think antitrust is necessarily going to be a real driving force behind that decision in the vast majority of transactions.

Thomas: Again, it's always good to have perspective. When you look at the actual numbers, only a very small percentage of transactions historically have been subject to enforcement actions requiring remedies or litigation, or in which parties abandon the deal. That said, given the current climate in which some take the view that "big is bad," a small company looking to exit might reasonably have some incrementally greater angst about the ability of a larger, deeper-pocketed competing company to acquire it. But I wouldn't be alarmist. The level of practical risk depends on the facts. And the vast majority of transactions will be cleared with no issues or perhaps with limited remedies. A very small number of deals are blocked or abandoned in any given year.

This increased scrutiny does provide a good opportunity for companies considering M&A to revisit their antitrust compliance. For example, ensure that company documents reflect reality and to the extent possible avoid exaggerated statements about your market position and reasons for doing a deal. Party documents, especially "hot documents," represent a significant aspect of agency investigations. This was true during the Trump administration and it applies equally going forward.