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### Antitrust looms large in Trump administration (with transcript)

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*Felicia Lin:* Welcome to Case in Point, produced by the University of Pennsylvania Law School, in collaboration with Bloomberg Law. Today we'll be talking with Herb Hovenkamp, the James G. Dinan University Professor, with appointments here at Penn Law and also the Wharton School. Joining us remotely from Arlington, Virginia is Liz Crampton, a reporter with Bloomberg Law. Liz, let's start with you. What signals are you seeing from the Trump administration about the direction that antitrust policy is taking?

*Liz Crampton:* Well, there's been a bit of a delay in getting political appointees in place at the Justice Department and Federal Trade Commission. Just about a month ago, Assistant Attorney General Makan Delrahim was sworn in.

And over at the FTC, it's been run by an acting chairman, Maureen Ohlhausen, since earlier this year. And it has just two commissioners. The White House did recently name a permanent chair and other commissioners that will have to go through Senate confirmation. So that delay has stalled the rollout of a full antitrust agenda under Trump, since the top decision makers weren't in place. But we were seeing some steps.

At the FTC, Chairman Ohlhausen has been really interested in occupational licensing issues. And despite having just two commissioners, the FTC has cleared some high profile mergers, such as Amazon's purchase of Whole Foods and Walgreen buying up the bulk of Rite Aid stores.

At the Justice Department, Delrahim has signaled that he's really interested in global international cooperation and coordination with foreign officials. And just this past weekend actually, the Justice Department filed an amicus brief in a dispute in Seattle over whether or not Uber and Lyft drivers can unionize.

And that brief represents a new initiative out of the Justice Department to really ramp up its appellate program and file more briefs and cases that the federal government takes an interest in. So you know, as the commission fills out and returns to its full five members, and Delrahim settles into his role, we'll see more policy initiatives rolled out.

*Felicia Lin:* And Herb, what about in the judicial branch? What are some of the big cases that you're watching in the courts right now?

*Herb Hovenkamp:* Well, the biggest one is the cert grant in the American Express case, which was about ten or twelve days ago. Which is a, it's a

Sherman Section 1 case that involves an allegedly anticompetitive agreement between American Express and Merchant Banks that very largely prevents American Express customers from having any incentive to use a different credit card than American Express or cash.

I mean, a merchant might, because American Express fees are very high, merchants would prefer that their customers use a different credit card or pay cash, but they are not allowed to give them any cash incentives or even tell them that they can get a better rate by using a different card. The district court found that to be illegal under the antitrust laws, and then the second circuit in New York reversed the district.

The case is very interesting, because the Justice Department initially brought the case, lost in the second circuit, and then after the election the Justice Department decided not to pursue a Supreme Court grant. But there were several states attorneys general involved, and the state of Ohio is finally the named plaintiff that won one cert. So it's going to be a very important case.

*Felicia Lin:* So, let's take a little bit of a step back. What is exactly at stake in some of these antitrust issues? Is it just about one or two companies dominating a market? Is it about a lack of meaningful choice for consumers? What are we talking about when we talk about antitrust?

*Herb Hovenkamp:* Well, in that particular case, American Express is really not a dominant firm. It shares, it's a big firm. But the general purpose credit card market is shared with Visa, MasterCard and Discover. And the real issue in the case is whether American Express is entitled under the antitrust laws to prevent customers from having certain kinds of information that might lead them to substitute to a card other than American Express or to a debit card or to pay cash.

*Felicia Lin:* Liz, you started off talking about some of your work about what the Justice Department is doing, both domestically and globally on antitrust. So what are some of the highlights of their antitrust enforcement and tracking, and what are the other agencies doing to support or be involved in antitrust policy?

*Liz Crampton:* So as I said, Delrahim, the antitrust chief at the Justice Department, is really big on increasing communication with foreign antitrust officials. He views enforcement as critical to ensuring a free fair market system, especially one that's grounded in economics. So

expect to see more cooperation in that space.

The Justice Department has been active in NAFTA renegotiations. They worked in the office of the U.S. Trade Representative to craft a competition chapter. And while the fate of NAFTA renegotiation is uncertain, officials have said that they will continue to work in that area and hope to incorporate competition chapters and other trade agreements.

*Felicia Lin:* And Herb, your written work focuses a lot on legal history. So what can those, what can some of the large seminal antitrust cases like Standard Oil tell us about the future of antitrust regulations. Particularly here I'm think of in the areas of technology, of Facebook and Google.

*Herb Hovenkamp:* Well, Standard Oil was a good victory and a bad remedy. That's one thing I think we've learned since 1911. The case is more than 100 years old now. The government got a victory in the Standard Oil case and then proceeded to break Standard Oil up into roughly 50 small companies, many of which remain monopolous or dominant firms in their areas. It was kind of a poorly designed remedy. And Mr. Delrahim is very, very concerned about appropriate remedies in antitrust cases.

I think he's thinking this through right now, and he's contemplating the merger between AT&T and Time Warner. The AT&T settlement, the other case I think you're referring to, I think it is one of the more successful antitrust outcomes in the United States. It occurred during the first Reagan administration, and broke up the telephone company and has turned the telephone company from a top to bottom regulated monopoly into a largely competitive firm at all levels right now, which means local service, long distance service, and telephone instruments.

I think the most relevant case however, for technology today, is the 2001 Microsoft case in the DC circuit, which condemned Microsoft for various acts of monopolization. Did not break Microsoft up, but imposed some conduct remedies on it. Mr. Delrahim has gone on record as not being very enthusiastic about conduct remedies. These are remedies where you order people to behave a certain way.

And frankly I think the record after Microsoft indicates that most of those remedies were not particularly effective. Now, Microsoft's products, at least some of them, are more competitive today then they were 15 years ago. But I really don't think the antitrust decree

had anything to do with it. A lot of that resulted from technological changes.

*Felicia Lin:* Liz, getting back to global markets. What are some of the issues American firms are facing in China and the E.U.?

*Liz Crampton:* So, the hot case right now is the E.U.'s investigation into Google's search practices. Earlier this year, in relation to its shopping services, and earlier this year the E.U. fined Google a record 2.7 billion for how it displayed search results of its rivals on its shopping pages. And Google has reportedly made an offer to the E.U. to resolve those concerns, and the E.U. is considering that.

In China, there is a worry among some in the U.S., particularly on Capital Hill, that China discriminates against U.S. companies via its antitrust enforcement. Which is one of the reasons why Delrahim has adopted this issue.

*Herb Hovenkamp:* Let me add something to that. I agree with all of that. I think in terms of getting unification as between the U.S. and particularly the E.U., the Google case is one of the biggest problems he faces. I think in that particular area, which is abuses by dominant firms, the U.S. and the E.U. are getting further and further apart. Most of the highly innovative firms that have gotten on the wrong side of antitrust issues in the last ten years or so have been American firms. And I think the Google case in the E.U. tells us why.

The E.U., it's not so much a bias against American firms. I agree, that's true of the Chinese. But, the E.U. competition authority basically puts landmines in the way of highly innovative firms. And that's what's going on right now in the case of Google and I think that explains and justifies why the U.S. and the E.U. have taken such different positions on that particular set of issues.

*Felicia Lin:* Can you give us some examples of those kinds of landmines that are particularly problematic?

*Herb Hovenkamp:* Well, this is a case that involves a dominant firm's duty to help out competitors. So Google Search is a unilaterally created search engine. It's one of many search engines. It's a default search engine, which means that for many devices such as android phones, it's the one you get when you buy your phone. But you can change it. Today if you want a dozen different search engines on your smart phone or your laptop or desktop you can have them.

But the E.U., in my view, has been listening way too much to

competitors and they are not necessarily small competitors. I mean, one of them is Microsoft for example. That want more and more micromanagement of the Google search algorithms. Search strategies. In order to create what they would consider to be a more level playing field. And the E.U. has listened to that. And what I find fairly disturbing is that they're not paying very much attention to consumers.

You know, in the United States we always look at consumers first when we do antitrust. We favor low prices, high output, and we measure antitrust success in terms of consumer satisfaction. And the consumer element in the E.U. Google case is very largely ignored in favor of listening to competitors.

*Felicia Lin:* Herb, I'd like to talk for a minute about your work writing about different presidential administrations, how they do in terms of the economy and job growth, and how that correlates with their antitrust policy. Can you share your thoughts about what this means for us now, when we have one party controlling all three branches of the government?

*Herb Hovenkamp:* Well, what it means depends pretty much on how that party listens. And right now I'm not particularly optimistic about that. But, you know the historical data are pretty uncontroversial. The economy does much better under Democratic administrations. If you look back at the last century or so, it's done roughly twice as good.

Now, we generally throw Hoover at one side and Franklin Delano Roosevelt on the other side out as outliers, because you know, the Hoover administration had the worst economic record of all presidencies since the 1920s. But that gives Hoover pretty much responsibility for the Depression. The FDR administration had the best, but of course that was substantially because of the recovery from the Depression and perhaps more importantly the lead up to World War II.

But even if you throw those two aside, Democratic administrations have produced almost twice, about 1.7 times as much economic growth per year as Republican administrations. Annually, they create roughly twice as many jobs. The record is not controversial. The explanations for it are.

My personal view is that Democrats overall have been more pragmatic when it comes to business policy. They've been less ideological, less concerned about appointing you know, libertarians or conservatives as such and more concerned about

solving problems, frequently empirically. And the result I think shows up as better economic performance.

*Felicia Lin:*                    Great. Well, thank you both for joining us. This has been a fascinating conversation. And thank you for joining us in Case in Point.

*[End of Audio]*