Antitrust Monopolization Enforcement: Transcript of DNC Platform Committee Antitrust Discussion; Delegate Specifically Called out Comcast, Google, and Amazon; New Language Calls for “Reinvigorating DOJ and FTC Enforcement”

Politics Update

While the Democratic platform committee meeting happened several days ago, stakeholders may not be fully grasping the significance of both the new antitrust language in the platform and Democrats’ willingness to call out large companies by name. Should Hillary Clinton win the presidency, stakeholders should expect more aggressive antitrust enforcement, especially when it comes to non-merger monopolization cases. While it is possible that the Clinton campaign will embrace the Democratic platform during the campaign and abandon it when the time to govern arrives, we believe that is the less likely outcome.

Dems strengthen platform’s antitrust language. Democrats amended their party platform Saturday to include even tougher language on antitrust enforcement. Former Senator Mark Pryor, a Clinton delegate, sponsored the amendment. Mary Bottari, a Bernie Sanders delegate, supported and discussed the Pryor amendment, which she explained was “operationally exactly the same” as an amendment she had previously filed with the platform committee (click here for transcript of platform committee discussion of antitrust, click here for audio, and click here for video of event).

Delegate calls out Comcast, Amazon, and Google. While discussing the amendment, Bottari specifically named Comcast, Amazon, Google, and other tech giants as targets: “Comcast controls half of all internet and cable subscribers in the United States. Google and Amazon and other tech giants are stepping all over little small tech companies and four too big to fail banks are even bigger today than they were before the financial crisis. Consumers feel it, innovation's harmed, mainstream businesses take a hit, and when mainstream businesses take a hit, it exacerbates and fuels inequality...We believe it is a new time and a new age for trust-busting, and I hope everyone can support this moment.”

The language also discusses discriminatory practices when it calls for enforcement of “abusive, discriminatory and unfair methods of commerce.” The use of the word “discriminatory” is particularly important given how dominant digital platforms use data to their advantage. Amazon perhaps represents the biggest target as antitrust principles shift from being price-focused to a broader lens - one that includes discriminatory conduct - for enforcement.

Many articles in recent years have looked at problems associated with Amazon’s practice of discriminatory pricing. A February 2015 White House report titled “Big Data and Differential Pricing” concluded, “The combination of differential pricing and big data raises concerns that some consumers can be made worse off, and have very little knowledge why.” Despite the attention, antitrust enforcers do not appear at all inclined to bring action related to discriminatory pricing. Such practices will be more likely to receive attention from a Clinton administration.

Further, Amazon has been accused of leveraging data to undermine its competitors. The Financial Times, in an article this week titled, “Amazon closes in on household names with own-label goods,” wrote, “Amazon’s push is particularly worrisome for competitors given the vast amounts of information it has about the items it sells on its site.” The article then quotes Chad Rubin, the CEO of Skubama, which the FT describes as “a company that helps Amazon sellers manage their sales.” The quote is a particularly interesting insight into how Amazon uses data...
against its competitors: “Amazon is actually using data to see what people are buying, what people are running out of, and they are starting to understand that they can utilize this to their advantage and go direct to consumers with their own branded product, which I believe is the wave of the future.” The FT added, “One concern for sellers is Amazon’s tendency to mimic the best-selling products in certain categories, and then sell them for a cheaper price.”

**Platform meeting adds to recent uptick in interest on antitrust.** Bottari mentioned Senator Warren’s recent speech at a June 29th New America/Capitol Forum event as inspiration for the amendment. As we have previously reported, this is the first time since 1988 that the Democratic Party platform will include language on antitrust and competition policy.

The new language in the amendment (click here for full amendment text) also refers to President Obama’s executive order on competition in April: “We support President Obama's recent executive order directing all agencies to identify specific actions they can take in their areas of jurisdiction to detect anticompetitive practices, such as tying arrangements, price fixing and exclusionary conduct, and to refer practices that appear to violate federal antitrust law to the DOJ and FTC.” The language in the platform discusses tying arrangements and exclusionary conduct, which are of interest regarding merger enforcement, but which are also a signal of an interest in greater monopolization enforcement at the antitrust agencies.

**Antitrust becoming overtly political rather than technocratic.** The antitrust amendment, by specifically citing the historic purpose of the law — “We support the historic purpose of the antitrust laws to protect competition and against the sort of excessively consolidated economic and political power, which can be corrosive to a healthy democracy” — also signals that antitrust decisions going forward will be considered hot-button political issues, rather than decisions left to technocrats and economists. That antitrust was the subject of so much debate and activity at a political event is itself a statement that antitrust is becoming more political.

**The term “reinvigorating” indicates a lack of enforcement.** The language further stated, “We support reinvigorating DOJ and FTC enforcement of antitrust laws to prevent abusive behavior by dominant companies and protecting the public interest against abusive, discriminatory and unfair methods of commerce.” This language suggests that the party committee viewed prior enforcement at the agencies as not in the public interest and in need of being “reinvigorated.”

**“Consumer welfare” absent from discussion.** Further, the consumer welfare test, or the notion that hypothetically lower prices can be a justification for consolidation — largely viewed by the antitrust community as a clear rule of thumb for antitrust enforcement — received a fairly thorough rebuke in the language, which calls for antitrust enforcement that would result in a decisions that are in the “public interest,” that would “protect competition” and that would protect “against the sort of excessively consolidated economic and political power, which can be corrosive to a healthy democracy.” The term “consumer welfare” is, importantly, absent from this landmark document.

In an article in today’s New York Times titled, “With Competition in Tatters, the Rip of Inequality Widens,” Times Reporter Eduardo Porter concluded, “But what might help most is not some narrow change in the procedures to examine business combinations but a broadening of the objectives of competition policy. Antitrust economists might hate this idea, but perhaps it’s time to broaden the discussion beyond how a decline in competition may hurt consumers, and to consider things other than narrow economic efficiency. That would include the way market concentration affects the distribution of the fruits of economic growth. It’s not just about the price of beer.”

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Should Clinton win the presidency, it is likely that high-level antitrust enforcers, their policies, and their personnel decisions will more likely reflect the priorities established in the platform rather than the consumer welfare doctrine originally advocated for by Chicago School economists.