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RICHARD M. STEUER

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Federal Trade Commission
Office of the Secretary
Room H-135 (Annex P)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re:HMG Review Project – Comment, Project No. P092900

To Whom It May Concern:

In connection with Question 15 of the Questions for Public Comment issued in connection with input into possibly updating the Horizontal Merger Guidelines, one of the most important "non-price effects of mergers" is the effect of mergers on jobs. Unquestionably, the effect on innovation – singled out in Question 15 – is significant, but so is the effect on employment, which is a particular concern in today's economy.

In this connection, I am enclosing for your consideration my recent article on Jobs and Antitrust, and in particular the discussion of merger law. My analysis does not indicate the need for revision of the Merger Guidelines but rather suggests that proper antitrust analysis should lead to the right results for employment. Nevertheless, I am submitting it for inclusion with your other input, in the event that the effect of the Merger Guidelines on employment and unemployment becomes a focus of your analysis.

This letter and the enclosed article are not being submitted on behalf of anyone else or any entity or organization. I hope you find the article of value to your deliberations.

Sincerely,

Jobs and Antitrust

BY RICHARD M. STEUER

ANTITRUST LAW IS NOT THE solution to soaring unemployment but it would be a mistake to assume that antitrust has no role to play in fostering jobs. European Competition Commissioner Neelie Kroes observed in 2005 that the "mission" of European antitrust enforcement "has never been more pressing" because "Europe urgently needs to increase its competitiveness; to deliver more growth and more jobs." The "European anti-trust community," she remarked, "can make a significant contribution to delivering an attractive environment for growth and jobs." She urged, "It is up to" that community "to explain . . . how competition strengthens the economy, so that people can have better, more secure jobs."[1]

Can antitrust enforcement deliver better jobs and greater job security? It can, to the extent that antitrust law's traditional objectives—stimulating competition and expanding output by fighting foreclosure and facilitating new entry—serve to create and sustain productive jobs. At the same time, it is important to guard against distorting the goals of antitrust to preserve inefficient jobs. More than ever, competition today is not simply among companies to sell more goods and services, but among nations to attract more production and jobs. This intensifies the pressure on each nation's antitrust laws to help expand job growth and avoid aggravating unemployment at any cost, making it especially important not to lose sight of the beacon of economic efficiency.

The Role of Jobs

The goal of American antitrust law generally is characterized as maximizing "consumer welfare." Called "the most abused term in modern antitrust analysis,"[2] consumer welfare is variously defined as either the welfare of consumers alone or the total welfare of consumers and producers together.[3] Either way, these definitions assume that because American workers all are consumers and work for producers, if America's consumers pay low prices and America's producers earn healthy profits, its workers will prosper.[4] This tends to understate the importance of jobs themselves to America's economic welfare. American consumers depend principally on paychecks for their income and American producers depend largely on American wage earners to buy their products and services. Exports are important, of course, but for the United States, they are not nearly as significant as domestic consumption.[5] Consequently, the loss of productive jobs—those that can be performed as efficiently in the United States as abroad—can be as harmful to America's overall economic welfare as inflated prices. Maximizing consumer welfare for consumers who are out of work is an empty promise. Maximizing producer welfare for producers faced with shrinking consumer demand is equally hollow. The issue should not be whether jobs merit consideration in the context of antitrust enforcement, but exactly what kind of consideration is warranted.

Richard M. Steuer is a partner in Mayer Brown LLP in New York City and an Officer of the Section of Antitrust Law.

As described in this article, it turns out that the recognized goals of antitrust law, properly applied, are entirely consistent with promoting job expansion. The staunch pursuit of competition and efficiency can be expected to yield the greatest sustainable employment. Accordingly, antitrust law is well up to the challenge of both protecting consumers from anticompetitive activity and assuring that such activity does not cost the country jobs that can continue to be performed here with efficiency in the future.

Maximizing Economic Welfare

Consumer welfare is not a static concept. Unlike allocative efficiency, which contemplates the optimal allocation of current resources to maximize the welfare of today's consumers,[6] consumer and producer welfare can take account of evolving consumer interests and dynamic efficiency improvements that enable producers to make more with less.[7]

In the short run, consumers need enough competition among producers to keep prices in check, while producers need enough consumption to be profitable under their existing cost structures. In the long run, however, consumers need sufficient new entry to make markets increasingly competitive and to create new jobs. Producers need efficiency gains, which require innovation, and greater consumption, which requires more domestic jobs and, to the extent possible, export growth.[8] In other words, long run consumer welfare in America depends on vigorous competition and the entry of new competitors, while long run producer welfare depends on increasing both efficiency and consumption. Since American producers continue to depend far more on domestic wages than on exports to drive consumption, the growth of America's economic welfare depends heavily on domestic jobs, and will for some time.[9]

The "Us" in AntitrUSt

To assess the role of antitrust law in combating unemployment, it is necessary not only to understand that the goal of antitrust is maximizing economic welfare, but to understand exactly whose economic welfare is meant to be maximized. If American antitrust law is intended to benefit us, who is "us"?

The economy may be global but antitrust law is not. Notwithstanding efforts towards global "convergence" and "harmonization,"[10] each of the world's competition regimes is rooted in a different authority, serving a discrete population and guarding against anticompetitive activity threatening its own economy.[11] The European Competition Law was implemented for the benefit of citizens of the EU member states. The competition laws of China, Japan, Brazil, and the hundred-plus jurisdictions adopting such measures were implemented for the benefit of citizens of those nations.

And the competition law of the United States was intended—at least to the extent that Congressional intent can be divined from the legislative history of the Sherman Act and the more recent Foreign Trade Antitrust Improvements Act—to maximize the economic welfare of the United States. This is reflected in cases like *Empagran*,[12] holding that U.S. antitrust law affords relief only for those injured by harm to the American economy (including domestic commerce, imports to the United States, and exporting activities engaged in within the United States).

But if the goal of American antitrust law is maximizing the economic welfare of America, just who is "American"? When the Sherman Act was adopted the answers were easy. American consumers lived in America. American producers were owned and operated in America by Americans. Today, the answers are far more complex. Individual American consumers still are easy to find.[13] American producers, however, now include production facilities located in the United States that are owned not only by American-based companies and American shareholders, but by companies headquartered abroad and by other countries' citizens, banks, and sovereign wealth funds.

While politicians and the press habitually refer to the future of "American" companies, there is little definition of what constitutes an "American" company in today's global economy. Is IBM, which earns more revenue outside the United States than within it, an "American" company?[14] Is Shell, which has been a household name in America for decades and has thousands of American shareholders and employees, a "foreign" company?[15] Similarly, today's start up entrepreneurs may be Americans living here or abroad, non-Americans living here or abroad, or, increasingly, globe trotting innovators who live and work in multiple locations, often supported by venture capitalists who can be located anywhere.

This is a far cry from the business landscape of 1890. Yet, when antitrust commentary addresses economic welfare or tackles such related issues as "national champions" and state aid, there is not always enough recognition of how much more complex the economy has grown. In today's economy, "us" should include not just consumers living in America, but producers, to the extent they are producing in America, regardless of where their owners live or their parent company headquarters may be found.

"Us" also should include the new entrants that American consumers need to fuel future competition and the wage earners that American producers need to sustain future demand. This is considerably messier than the simple economic models of economic welfare that went before, but without defining "us," it is impossible to give full content to the goals of antitrust, let alone to expect success in achieving them.

The Issue

If the "us" served by U.S. antitrust law includes not only America's consumers and producers, but its new entrants and jobholders, is U.S. antitrust law accomplishing the mission of encouraging entry and fostering jobs? Preservation of opportunities for new entry already is tightly woven into the fabric of American antitrust law, in the rules designed to prevent foreclosure of competition.[16] Today, the pressing issue is whether antitrust law should be playing a greater role—or any role at all—in assuring Americans jobs. After all, there are other programs specifically designed to address job creation and job preservation. Training and education programs, public works projects, tax policy, veterans programs and other initiatives at both the state and federal level all commit resources to creating jobs in the United States and training Americans to perform them. At the same time, trade law itself includes certain provisions to tackle job training issues[17] and, of course, duties can provide strong incentives for manufacturers to open local production facilities in lieu of importing.

Advocates for the economic welfare standard insist that compromising consumer welfare (whether or not including producer welfare) as the only goal of antitrust will lead down a slippery slope to economic decline.[18] They argue that once this goal is diluted by other objectives, the economy will grow less efficient and less competitive, leading in the long run to less consumption, less production, and less productive jobs. With economic welfare as the only goal, there will be better allocation of resources, more consumption, more production, and more good jobs. This may all be true, but sustaining efficient jobs simply by promoting the expansion of output through greater competition, entry, and innovation is not a goal outside economic welfare—it is an integral part of economic welfare itself. Neither allocative efficiency nor productive efficiency can be maximized without such growth.

This does not mean that America should adopt a "beggar thy neighbor" approach. Protectionism is not a solution. Trade is the future, and imports as well as exports should continue to flow, enabling the economy to reach its full potential. At the same time, however, it is essential to sustain efficient domestic jobs, to assure that the economy remains buoyant and globally competitive while making the transition to that future. The question for the antitrust community is what role should antitrust play?

The Answers

There is, in fact, a constructive approach to antitrust analysis that recognizes the importance of jobs to maximizing America's economic welfare without impairing the economy's efficiency or competitiveness, and without isolationism. The key is to afford the correct consideration to jobs in performing antitrust analysis.

How? First, not by sacrificing efficiency or competitiveness for short-term preservation of inefficient jobs, but by pursuing the goal of long-term total economic welfare in formulating and applying antitrust standards, cognizant of the fact that a strong domestic job base remains critical to the country's total economic welfare. Antitrust law should not impede, and where possible should foster, sufficient sustainable employment to maximize economic welfare. As described below, this sometimes may actually mean facilitating a reduction in the number of jobs in order to save those that remain, but whether the objective is growing or saving jobs, antitrust should be part of the solution.

Second, by recognizing that other competition regimes legitimately can do the same for their own economies, but that if those other regimes overreach and become subterfuges serving to protect jobs abroad at any cost, countermeasures may be in order.

Third, by encouraging more efficient utilization of workers in America through the provision of greater antitrust guidance to American industry. Too often, concern over antitrust consequences has discouraged creativity in conceiving measures to make jobs more efficient and therefore more likely to remain in the United States. The Federal Trade Commission should seize the initiative to teach the business community how to create more efficient jobs without overstepping the limits of the antitrust laws.

Of course, the devil is in the details, so here is how U.S. antitrust law can be applied to promote competition without sacrificing those jobs that, as a matter of long run economic welfare, ought to be retained in the United States.

Mergers

Merger analysis repeatedly has raised the issue of job loss and can present some of the most vexing choices for antitrust enforcers. When companies merge, or one company is acquired by another, reductions in job force typically deliver part of the savings expected to be achieved. Often, jobs have been shed in the United States and their functions shifted abroad, where the same work can be performed at lower cost. This should be good for producers, reducing their costs. It also should be good for consumers to the extent that part of those savings are passed along in lower prices. It is not good in the short term for those who lose their jobs, of course,[19] or for overall economic welfare in the United States if the lost buying power of those who lose jobs is never replaced by new demand for American goods and services either at home or abroad.

Nevertheless, if performance of the jobs that are eliminated has grown inefficient, so that the merger or acquisition substitutes a more efficient alternative, the long term prospects for keeping those jobs in the United States would be poor in any event. Also, the loss of jobs that can better be performed abroad sometimes creates new job opportunities at home. When procompetitive or competitively neutral mergers are allowed to proceed, resulting in the loss of jobs that are not likely to withstand the tide of competition for long under any circumstances, the short term loss of buying power from eliminating those jobs can be expected to be outweighed by the efficiencies to be achieved by the merging companies, as well as the economic benefit of keeping the streamlined company in the economy, and by the long term gains to be achieved by redirecting the energies of those who lose their jobs into more productive endeavors.[20]

On the other hand, if an anticompetitive merger or acquisition is permitted to close, resulting in too few competitors surviving in the industry and fewer jobs remaining in the United States than would exist under a more efficient resource allocation in a market with more competitors, there would be a reduction in competition, output, and total economic welfare, not only from the diminution in consumer surplus (resulting from higher prices), but from the contraction of wages (and wage-earner buying power) and the shift from both consumers and wage earners to a combination of "monopoly" profits and deadweight loss. In such circumstances, not only are prices likely to rise above competitive levels and consumer welfare likely to be diminished, but the loss of wage-earner buying power can impact a wide swath of producers that rely on U.S. consumers to buy most of their goods and services.

While the loss of efficient jobs at one company is unlikely to impact the economy as a whole, the loss of enough sustainable jobs across the country or within a region could make a real difference. This suggests that if an anticompetitive acquisition would eliminate numerous jobs at an acquired competitor that should have remained independent, and/or at rival firms that are driven out of business, the loss to America's economic welfare would be greater than the impact on prices alone—assuming that but for the acquisition those jobs would continue to be performed efficiently in the United States and that the loss of those jobs would not be offset by the concomitant creation of new jobs. Without recognition of both the threatened loss due to higher prices and the threatened loss due to job erosion, an anticompetitive merger might not be afforded as much attention as it deserves.

Moreover, even if prices remain the same, if an anticompetitive merger reduces the number of rivals in the market, resulting in the loss of efficient, productive jobs at rival firms, this too can result in a loss in overall economic welfare. For example, if the merging parties guarantee not to raise prices or are constrained not to raise prices, the analysis of welfare effects need not stop with the measurement of cost savings but can include consideration of the long term impact on quality competition, rival research, innovation, and new entry—all of which would impact jobs. If economic welfare is unaffected in the short run, because costs decrease and consumers do not pay more, but is harmed in the long run by the loss of rivalry, there can be more to the analysis than assessing near term prices.

Other countries have adopted specific provisions for taking jobs into account when reviewing mergers and acquisitions involving foreign ownership, but the focus of those measures is aimed more narrowly on preventing the contraction of jobs at the merging firms themselves than on maximizing economic welfare by promoting competition. Canada, for example, requires the prior approval of its Minister of Industry for the acquisition or creation by non-Canadians of a "Canadian business" (which need not be Canadian-owned so long as it has a place of business, employees, and assets in Canada), if such business exceeds a certain size. The Minister's determination must be based on whether "the investment is likely to be of net benefit to Canada" under specified criteria, including "the effect on employment."[21] China and other countries have similar restrictions, with China's law attracting the greatest attention.[22]

The closest the United States comes to such an approach is consideration of the effects of foreign investment on national security. The Committee on Foreign Investment in the United States (CFIUS) exercises review over foreign investment with national security implications, including investments in government contractors and in companies operating critical infrastructure, such as energy, transportation and finance.[23] The CFIUS program requires a separate assessment of the impact of an acquisition on strategic jobs, which maintain skills critical to the nation's strategic interests. (The Secretary of Labor serves as an ex officio, non-voting member of the Committee.) Other countries have comparable national security restrictions, but many also require review of the impact of foreign investment on other factors, including, as in the examples above, the impact on domestic jobs. Are jobs standards of this kind a prescription for inefficiency, or is the United States sacrificing the interests of its workforce and its economic welfare if it fails to adopt similar measures?

National security aside, the answer for America lies not in merger oversight by a "Jobs Czar" or in preserving jobs for their own sake, but in recognizing that America's antitrust enforcement agencies and courts should not ignore the impact on employment when assessing mergers and acquisitions. This does not mean that merger analysis should substitute assessment of job loss for analysis of output restriction and other competitive effects. Nor does it mean that foreign acquirers should be treated differently than U.S. acquirers. The United States is committed to a policy of non-discrimination (assuming that it is reciprocal) and, in any event, "American" companies (whatever that means today) frequently move jobs abroad themselves. What it does mean is that in tallying the anticipated impact of an acquisition on all the factors that traditionally have been considered relevant—including prices, concentration, entry, foreclosure, innovation, production efficiencies, overhead savings, network effects, countervailing buyer power, likelihood of collusion, failing firm prospects, international comity, and other factors, some more quantifiable than others—it is appropriate to recognize the impact on jobs in an industry because anticompetitive mergers accompanied by the substantial loss of efficient and sustainable domestic jobs may harm not only short-term consumer welfare (by causing prices to rise) but overall economic welfare (by contracting demand).

For example, if an acquisition threatens to raise concentration seriously, cut capacity with little gain in efficiency, and shut down rivals that provide productive domestic jobs, the agencies and courts should be free to consider all of those effects on the nation's economic welfare. Likewise, if a merger is expected to consolidate jobs and reduce headcount to increase efficiency, making the surviving jobs more productive and therefore more secure, this too should be a legitimate consideration. Again, this is not because jobs are as important as economic welfare; rather, it is because efficient, sustainable jobs are part of economic welfare.

Joint Ventures

Antitrust law has grown increasingly flexible toward joint ventures, partly in recognition of their potential to spawn innovation, efficiency gains, and jobs. Congress enacted special legislation in 1984 and 1993 to shield research and development joint ventures and production joint ventures from per se illegality.[24] The Federal Trade Commission permitted General Motors to enter into a production joint venture with Toyota in 1984, at a time when such ventures were viewed with considerable suspicion.[25] Today, joint ventures are approved with regularity and are challenged primarily when they serve as devices to mask price fixing or output restriction, or simply to avoid competition that otherwise would take place.

This approach is consistent with the objective of creating jobs as a means of expanding economic welfare. Joint ventures that generate new products, greater efficiency, and more innovation frequently hold the potential to expand the number of jobs, growing overall economic welfare by adding to wages and, with them, consumer demand. Of course, if two firms that are capable of competing form a joint venture to avoid competition without creating anything new, that likely would result in fewer jobs as well as fewer choices, less competition, and higher prices. The existing standards for assessing joint ventures aptly distinguish between procompetitive and anticompetitive collaborations among competitors, and in the process should reach the right result in maximizing economic welfare, including the impact on jobs.

Job creation rarely is near the top of the list of anticipated benefits from traditional joint ventures, but in appropriate cases it merits consideration. This may change the analysis of joint ventures little in most instances, but in tallying the benefits of a venture, the long term impact on economic welfare through job creation should not be underestimated and may tip the balance in some cases.

There is one category of joint ventures that merits special consideration in this context—a category where jobs actually are at the top of the list. Increasingly, companies today are searching for means to achieve greater efficiency by sharing the cost of certain jobs with other companies, including competitors. This may involve procurement specialists collaborating in a joint purchasing venture, delivery drivers combining routes in a joint delivery venture, sales representatives combining sales calls in a joint marketing venture, specialized technicians or engineers sharing expertise and tools, customer service representatives sharing responsibility for fielding complaints, or information services personnel sharing coverage duties. There was a time when companies were reluctant even to consider such measures, content to absorb the expense of underutilized workers. Today, this is an extravagance companies can ill afford.

Combining jobs with other companies, even competitors, can create efficiencies without endangering competition, so long as adequate safeguards are instituted and observed. For example, several competitors may be able to enjoy savings by combining their deliveries if they all sell to the same customers, and could develop means to assure that competitively-sensitive information will not be exchanged in the process. Ventures of this kind will result in contraction of the number of jobs, of course, but should ensure that those jobs that do remain will become more efficient and therefore more sustainable.

Practices

In general, anticompetitive practices reduce output and, as a consequence, they adversely impact employment. While it may seem obvious that anticompetitive practices not only tend to raise prices to consumers but tend to reduce opportunities for employment, not all practices that violate the antitrust laws have the same effect on jobs.

Cartels and Boycotts. Cartels hurt both consumers and jobholders by raising prices and limiting output. American law criminalizes cartels in the United States, but explicitly exempts export cartels,[26] leaving it to other nations to protect their own economies. The wisdom of exempting U.S. export cartels from American antitrust law has been open to debate,[27] and it is worth asking whether greater competition among exporters would result in more jobs in America.

Boycotts not only can diminish competition and increase prices, but can hurt both new entrants and the jobs they would create, making consideration of the impact of boycotts on jobs entirely consistent with the standards that already exist.[28]

Unilateral Conduct. To the extent that a firm with monopoly power, or threatening to acquire monopoly power, excludes or destroys competitors not on the basis of efficiency but solely as a means of obtaining or augmenting monopoly power, job opportunities—along with opportunities for new entry—likely will be lost in the process. If a monopolist excludes new rivals, this also excludes new jobs. Current legal standards regarding monopolization and attempted monopolization, properly applied, should be consistent with preserving not only competition, but also entry opportunities and job opportunities. Of course, if the monopolist is outpacing its rivals on the strength of greater industry and efficiency, this is a desirable outcome.

Vertical Exclusionary Agreements. Vertical agreements that foreclose competitors, such as exclusive dealing and tying agreements, may reduce jobs if they result in so much foreclosure as to be anticompetitive. However, such agreements have the potential to bolster employment by assuring producers of sales and allowing them to plan production more efficiently. If exclusionary agreements strengthen employment, that itself may be a sign that they are procompetitive.[29] If, on the other hand, they eliminate jobs, that may be a sign that they either are unreasonably exclusionary or are creating greater efficiency that eliminates relatively inefficient jobs.[30] If the former, prices can be expected to rise and output fall; if the latter, the opposite should occur.

Price Discrimination. Price discrimination is in a category of its own. It is subject both to the Sherman Act, which protects competition, and the Robinson-Patman Act, which was intended largely to protect small dealers. To the extent that price discrimination (and promotional discrimination) forecloses competitors, it can be expected to have an impact similar to other means of foreclosing competitors and warrants a similar analysis. To the extent that such discrimination violates the Robinson-Patman Act without regard to an impact on competition (as with per se violations of the rules against promotional allowance discrimination), enforcement of the law actually may result in preserving inefficient domestic jobs. This is likely to have only a limited effect on America's global competitiveness because most of these jobs involve domestic distribution, but they still have the potential to detract from America's overall economic welfare to the extent that inefficient retailers and wholesalers are perpetuated, preserving inefficient jobs, since these resources could better be devoted elsewhere.

Countermeasures to Protectionism Abroad

The approaches to antitrust analysis described above should prove constructive regardless of whether other countries apply a similar approach in their treatment of American companies and products. However, not all countries necessarily play by the same rules.[31] If the policies of other countries are more protectionist toward jobs than the policies of the United States, too many jobs that efficiently could be filled in America may be commandeered by other countries instead.

In a world governed purely by economic theory, maximizing consumer welfare eventually should result in both optimal resource allocation and optimal job allocation everywhere—but what if the policies of some countries focus more on creating and protecting jobs there, efficient or not, than on consumer welfare?[32] Such countries would enjoy an advantage over those that focus entirely on short term consumer welfare to achieve low prices, allowing productive jobs to be captured by other countries in the equivalent of economic unilateral disarmament. Issues of asymmetrical national policies arise regularly, of course, with respect to duties and quotas.[33] They also arise with respect to subsidies and state aid to "national champions" and other local businesses.[34] Should the United States allow jobs to be exported to countries with competition regimes that are more protectionist than American antitrust law, or should countervailing measures be taken?

In theory, there would be some logic to retaliation, and it has been the subject of serious discussion,[35] but it may not be practical to administer such an approach in most instances. Assessing other countries' application of their competition laws would be no easy task and, in many instances, the necessary information may not be reliable, or even available.[36] Nonetheless, cases may arise under U.S. law that are not close, where a threatened exodus of jobs to a country that applies its own competition laws in a protectionist manner dictates the outcome of an analysis under U.S. antitrust law. For example, if the state-owned widget monopoly of a foreign country wanted to acquire the last remaining widget manufacturer in the United States and the foreign country had been enforcing its competition laws to prevent the loss of jobs there regardless of efficiencies, this might cause antitrust officials in the U.S. to conclude that in the long run, not only would price competition within the U.S. widget market be unduly threatened, but that the anticipated loss of jobs in the U.S. would compound the threat to America's economic welfare. Similarly, if the government of another country had been subsidizing its local widget monopoly, or if it had been excluding U.S. widgets through excessive duties or quotas, threatening U.S. jobs, this might tip the balance in favor of approving a merger between America's last two widget makers, better enabling them to continue competing abroad and preserving American jobs that would remain efficient by virtue of the merger.

At the same time, such discrimination could provide the basis for diplomatic negotiation or complaints in the context of bilateral or multilateral trade agreements.[37] The prospect of sanctions in the context of international trade negotiation or dispute resolution may provide only a blunt instrument, but if other alternatives are not likely to be effective, there may be no better alternative. Antitrust and trade law do not always work in unison, but in circumstances of this kind, trade law may provide the surest means to accomplish the goal of maximizing economic welfare.

Guidance

As important as the measures described above may be, it is equally important to educate America's business community that antitrust enforcement is not an impediment to job creation and preservation. Too many executives have been so thoroughly inculcated with the warning never to talk with a competitor that they would not even consider collaborating with competitors over jobs. Confusion over the application of the antitrust laws to activity subject to union contracts can contribute to the uncertainty.[38] Even seasoned antitrust counselors may be uncomfortable suggesting or blessing cost-sharing programs combining job functions. The 2000 Collaboration Guidelines issued by the Federal Trade Commission and U.S. Department of Justice represented a laudable effort to teach American business that antitrust does not stand in the way of most joint ventures. Those guidelines provided a good start, but their authors could not anticipate the current need to focus more on jobs. Today, the Federal Trade Commission has the occasion to undertake a new education program to ensure that American industry understands the range of joint activity in which companies, including competitors, may engage to make jobs more efficient. This could take the form of hearings, workshops, speeches, or any means the Commission deems appropriate. The Commission long has recognized that central to its mission is the provision of guidance, including "do's" as well as "don'ts." At this challenging time, the FTC could play an important role in ensuring that America's businesses do not miss key opportunities to make jobs more efficient before they are lost forever.

Conclusion

Antitrust policy is not the answer to America's employment issues, but neither can it ignore the importance of jobs to economic welfare or the impact that antitrust can exert on jobs. Too often, antitrust enforcers and commentators convey the impression that there is something untoward about entertaining concerns over jobs. In reality, an economy without enough competition to keep generating jobs risks descending into a downward economic spiral, with too few jobs to sustain adequate domestic consumption, production, and future employment—leading to even less consumption, less production, and less employment.

Maximizing America's economic welfare requires an antitrust policy that appreciates the importance of jobs. This is not a radical proposition. The goal of maximizing economic welfare should not be abandoned or even diminished, but at the same time it must be recognized how much jobs contribute to that welfare. Maximizing America's economic welfare for the next generation will require the creation and preservation of enough efficient jobs to sustain and grow domestic consumption, and the measures described above can help. American antitrust policy should not become protectionist in the face of difficult economic conditions, but neither should it be blind to the impact that antitrust decisions can have on America's jobs, and with them, on America's future. ■

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1 Neelie Kroes, Taking Competition Seriously—Anti-Trust Reform in Europe, Speech/05/157 (Mar. 10, 2005). *See also* Neelie Kroes, Road to Recovery, Speech/09/63 (Feb. 17, 2009) ("[w]e say no to protectionism" but must create "real jobs with real futures, not jobs that only exist as long as the taxpayers' money exists").

2 Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1032 (1987); David Spector et al., *Industrial Policy, Competition Policy and National Champions*, DAF/COMP/6F (2009) 1/REV 1, at 7 (OECD Feb. 16, 2009). For a brief summary of issues associated with defining consumer welfare, see Glossary of Industrial Organisation Economics and Competition Law, compiled by R.S. Khemani and D.M. Shapiro, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD, 1993, http://www.oecd.org/dataoecd/8/61/2376087.pdf ("Consumer welfare refers to the individual benefits derived from the consumption of goods and services. In theory, individual welfare is defined by an individual's own assessment of his/her satisfaction, given prices and income. Exact measurement of consumer welfare therefore requires information about individual preferences. In practice, applied welfare economics uses the notion of consumer surplus to measure consumer welfare. When measured over all consumers, consumers' surplus is a measure of aggregate consumer welfare. In anti-trust applications, some argue that the goal is to maximize consumers' surplus, while others argue that producer benefits should also be counted.").

3 See Fei Deng & Gregory K. Leonard, *Allocative and Productive Efficiency*, *in* ISSUES IN COMPETITION LAW AND POLICY 449–51 (ABA Section of Antitrust Law, 2008); ROBERT H. BORK, THE ANTITRUST PARADOX, 51 (1978). The Supreme Court has cited consumer welfare as the goal of antitrust more than once but it has been noted that in none of these opinions has the Court indicated definitively what it understood consumer welfare to mean. *See* Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTITRUST L.J. 707 (2007). Judge Bork's own conception of consumer welfare has been explained as encompassing both consumer welfare and producer welfare. Steven Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 GEO. MASON L. REV. 617, 646–47 n.28 (1999).

4 *See, e.g.*, PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 111, at 105 (2006) ("Everyone—big business, small business, employee, and retired alike—shows up in the market as a consumer."); EINER ELHAUGE & DAMIEN

GERADIN, GLOBAL ANTITRUST LAW AND ECONOMICS 1103 (2007) ("any business profits will redound to the benefit of consumers in their roles as the firm's employees or stockholders or as citizens that benefit from taxes on the firm's profits").

[5] ELHAUGE & GERADIN, *supra* note 4, at 1102 ("both U.S. and EC trade deficits and surpluses remain so small in relation to overall GDP that they seem unlikely to be a significant influence"). One could posit economies less dependent on domestic employment and consumption, such as oil-rich states or tourist islands where purchasing power is more dependent on exporting goods or importing visiting consumers than on local citizens' wages and consumption. That does not describe the economy of the United States or of many other industrialized countries which, at least for the time being, do not generate enough exports to drive robust output without an ample number of domestic jobs.

[6] *See* Brodley, *supra* note 2, at 1027 ("allocative efficiency, which is achieved when goods are priced at marginal or incremental cost, maximizes social wealth at a fixed point in time").

[7] *Id.* at 1033 (consumer welfare has a "temporal dimension" and can be defined as "consumer surplus maximized over the long run"); Charles F. Rule, Consumer Welfare, Efficiencies, and Mergers, Statement to Antitrust Modernization Commission 3 (Nov. 17, 2005) ("productive efficiency is a more dynamic concept that can literally always be improved and never maximized").

[8] Of course, consumption also can be stimulated through government spending, but in most countries, including the United States, there are limits on the ability of the government to spend indefinitely without growth in the incomes of its own taxpayers. Also, the day may come when the United States exports so much that domestic wages become less important to sustaining American production, but that day is not foreseeable yet.

[9] Adherents of the viewpoint that consumer welfare equates with consumer surplus alone point out that consumer welfare has a temporal dimension "since consumers have both immediate and longer-run welfare interests." Brodley, *supra* note 2, at 1033. Bearing in mind the long-term perspective of antitrust policy, this school believes that consumer welfare can best be described as the "goal of antitrust as consumer surplus maximized over the long run." *Id.*

[10] The World Trade Organization, which considered formal international negotiation over competition policy, determined in 2004 not to proceed with those negotiations. *See* http://www.wto.org/english/tratop_e/comp_e/comp_e.htm

[11] *See* ABA SECTION OF ANTITRUST LAW, COMPETITION LAW OUTSIDE THE UNITED STATES, *Overview* 101–03 (2001).

[12] F. Hoffmann-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

[13] Other American consumers include businesses located in the United States, regardless of who owns or controls them, and also could include buyers who procure goods abroad for resale in the United States. These include both manufacturers and retailers that purchase goods through overseas purchasing offices and then import those goods into the United States.

[14] Steve Hamm, *IBM vs. Tata: Which Is More American?*, BUS. WK., May 5, 2008, at 28.

[15] *See* http://www.shell.us/home/content/usa/aboutshell/who_we_are/.

[16] *See* Richard M. Steuer, *Foreclosure*, *in* ISSUES IN COMPETITION LAW AND POLICY, 925–37 (ABA Section of Antitrust Law, 2008); Brodley, *supra* note 2, at 1044–45.

[17] *See, e.g.*, Trade Act of 1974, as amended, 19 U.S.C. §§ 2271 et seq. (establishing the Trade Adjustment Assistance program).

[18] Bork, *supra* note 3, at 405.

[19] LOUIS UCHITELLE, THE DISPOSABLE AMERICAN (2006).

[20] The benefit of efficiencies to shareholder value has not been without debate. *See, e.g.*, James A. Fanto, *Braking the Merger Momentum: Reforming Corporate Law Governing Mega-Mergers* (Working Paper, May 22, 2000), *available at* SSRN: http://ssrn.com/abstract=223149 or DOI:10.2139/ssrn.223149; Spector et al., *supra* note 2, at 6. Unemployment of people transitioning between jobs sometimes is called "frictional unemployment."

[21] *See* Investment Canada Act §§ 20, 21.

[22] *See* China Provisions on Merging and Splitting Up Enterprises with Foreign Investment, Art. 17; China Provisions on Foreign Investors to Merge Domestic Enterprises, Arts. 21–23. Such jurisdictions as South Africa, Argentina, France, and Greece also have provisions authorizing effects on employment to be taken into account. Spector et al., *supra* note 2, at 10–11.

[23] *See* 50 U.S.C. App. 2170; 31 C.F.R. pt. 800. The Secretary of Labor serves as an ex officio, non-voting member, but CFIUS reviews are supposed to focus solely on national security and "not on other national interests." U.S. Dep't of the Treasury, Guidance Concerning the National Security Review Conducted by the Committee of Foreign Investments in the United States 3, *available at* http://www.treas.gov/offices/international-affairs/cfius/docs/GuidanceFinal_12012008.pdf.

[24] National Cooperative Research Act of 1984, as amended by the National Cooperative Research and Production Act of 1993, 15 U.S.C. §§ 4301–4305.

[25] General Motors Corp., 103 F.T.C. 372 (1984).

[26] Export associations enjoy various exemptions from the antitrust law under the 1918 Webb-Pomerence Act, 15 U.S.C. §§ 61–66, the Export Trading Company Act of 1982, 15 U.S.C. §§ 4001–4016, and the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a.

[27] *See* Paul Victor, *Export Cartels: An Idea Whose Time Has Passed*, 60 ANTITRUST L.J. 571 (1991); Spencer Weber Waller, *The Failure of the Export Trading Company Program*, 17 N.C. J. INT'L L. & COM. REG. 239 (1992).

[28] *See generally* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 105–14 (6th ed. 2007). At the same time, the case law reflects many situations in which refusals to deal with a firm serve procompetitive purposes, for example by keeping hazardous products off the market. These applications of the law are equally consistent with the goal of creating and preserving efficient jobs without perpetuating wasteful or economically destructive jobs.

[29] AREEDA & HOVENKAMP, *supra* note 4, at 118 ("full employment and productivity and price stability are sometimes regarded as incidents of effective competition").

[30] Vertical *sales* restraints, such as resale price maintenance, territorial restraints, and customer restraints, are unlikely to have a material impact on jobs. To the extent that they eliminate free riding and expand output, they should help to grow jobs. To the extent that manufacturers miscalculate and impose price, territory, and customer restraints that diminish output, they might contract jobs, but that is not likely to be the manufacturer's objective except in those instances where such restraints are a means to further monopoly power or a cartel.

[31] ELHAUGE & GERADIN, *supra* note 4, at 1011 ("each nation's antitrust enforcement or policy choices might be biased to the extent that the conduct's effects are distributed unequally across nations").

[32] *Id.* at 1101–02 ("nations that are net importers would be more likely to choose pro-consumer antitrust standards, whereas nations that are net exporters would be more likely to choose pro-producer antitrust standards").

[33] Andrew Guzman, *The Case for International Antitrust*, BERKELEY J. INT'L L. 355, 368 (2004) (trade can "substitute for competition policy in some instances" such as "a small, closed economy in which local monopolies harm consumers" but "can only undermine monopolies that rely on trade barriers for their existence" and firms possessing international market power can be expected to "behave as monopolists just like domestic firms with market power").

[34] *See* COMPETITION LAW OUTSIDE THE UNITED STATES, *Overview*, *supra* note 11, at 109–12. The EU faces this issue intra-Community in confronting state aid that may afford producers in one member state an unfair advantage over producers in other member states. However, the EU has a mechanism to require each member country to play by the same rules and also has a unified antitrust policy. *See* Treaty Establishing the European Community, Article 87, Nov. 10, 1997, O.J. (C 340). The larger world economy is subject to some multinational economic treaties, such as those addressing subsidies and dumping, but does not always observe reciprocity with respect to state aid or competition law discrimination.

[35] *See* COMPETITION LAW OUTSIDE THE UNITED STATES, Overview, *supra* note 11, at 101–03.

[36] Guzman, *supra* note 38, at 372 ("The most plausible agenda item is a nondiscrimination principle" but "[t]his sort of comparison is much more difficult in the antitrust context because each prosecution turns on a unique set of facts."); *id.* at 373 ("A national treatment obligation for antitrust . . . is useful primarily to prevent the use of export cartel exemptions and perhaps to constrain egregious forms of de facto discrimination. It cannot prevent regulators from favoring locals in the day-to-day administration of the law" or strategically applying domestic law).

[37] *See* COMPETITION LAW OUTSIDE THE UNITED STATES, *Overview*, *supra* note 11, at 101 nn.550–553; INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, FINAL REPORT 30, 259, 269–70, 275 (2000).

[38] *See, e.g.*, American Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 480 F. Supp. 2d 471 (D. Mass. 2007).