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Antitrust: Sound and Fury?

Remarks

of

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AMERICAN BAR ASSOCIATION
Antitrust Speech

Gentlemen, for four days you have been sharing the thoughts, ideas and projections of the preeminent members of the antitrust bar. In recent weeks you have been reading in U.S. News & World Report and the Wall Street Journal about the "runaway boom in mergers;" Time magazine has told us that while the Justice Department grows "more cautious", the Federal Trade Commission is "more aggressive" ... "bolder"; and Ralph Nader, testifying before a Senate Sub-Committee, has indicated that General Motors is a "classic candidate" for antitrust action, the only obstacle to which is "political." Professor Galbraith has recently stated that contemporary antitrust policy and its efforts are a "charade", while prominent and able economists

vigorously dissent to that view and make cogent arguments in support of the viability of our antitrust laws. The President has appointed a special Commission to study and report on the antitrust laws, and this Section has now completed an up-dating of the 1955 Report of the Attorney General's Committee. And Thomas Austern continues to challenge the Robinson-Patman Act.

Surely these are not sleepy times in antitrust. The enforcement agencies and this bar cannot afford to feel complacement about the status of the law.

It would seem inappropriate for a postulant to digest the opinions, call attention to the errors, resolve the conflicts, and propose conclusions, particularly in front of this distinguished and informed body. But, as one who has been thrust into the middle of the controversy and turmoil, I would like to share with you some perhaps less ambitious, but I hope meaningful, and practical, observations.

I.

The antitrust imbroglio which engulfs us all is not susceptible to easy resolution. It involves not only the narrow questions pertaining to refinements of existing law, but more importantly, the broader issues relating to the overall direction and future of antitrust. Therefore,

my remarks are not going to be of a "how to" or "my view" nature. If you came this morning to get some key, some insight, on whether the Federal Trade Commission might approve or settle or challenge (or perhaps even look into) that problem sitting back on your desk, you are going to be disappointed.

Professor Turner and Ed Zimmerman have brought some clarity to the law through their preliminary, albeit comprehensive, merger guides which the Department of Justice will utilize. As a part of the process of review and reevaluation which I believe should characterize the continuing renewal of any institution, these merger guides make a truly meaningful contribution to the institution of antitrust. In like manner, the Commission from time to time proposes Guides that are designed to bring some measure of order out of confusion or chaos. Today, however, I hope to make a case for much broader efforts at self-renewal.

Antitrust enforcement has exhibited both success and failure, and neither can be ignored. In examining the nature and quality of the law and its enforcement, there is a temptation to dwell at length upon positive achievements. This arises, not from a need for self-justification or self-defense, but rather from a conviction that

too little attention is called to the good that sound antitrust enforcement produces.

It is disturbing to realize that except for the personnel of the enforcement agencies, some legislators and this very esteemed and specialized bar, the rest of the country is not particularly interested. Antitrust is not a burning public issue. Only a rare industry-wide conspiracy or price-fixing expose is considered sufficiently newsworthy to receive other than business page coverage by the press or a brief mention on the six o'clock news.

In view of the indifference that antitrust seems to engender in the collective public consciousness, its greatest achievement in recent times must be that it has endured and remained entrenched. There is, or should be, little doubt that hard core violations will continue to be prosecuted with vigor, and as a result, there is a considerable degree of compliance on the part of business with the clearly defined areas of the law. Where the anticompetitive nature of the acts or practices has been reasonably clear and where the available remedy has been pro-competitive, knowledgeable persons should find little fault with recent enforcement efforts. It is a mistake to discount the substantial success of antitrust, and I

refuse to join those who choose to do so. [1/]

Effective and prompt action against some of the cruder forms of anticompetitive conduct does not excuse the enforcement agencies from their failure to face up to the more difficult and sensitive problems of antitrust. We have been constantly reminded of the absence of competitive forces in some industries, of concentrated power in the hands of a few giants, and of the growing concentration of power in the hands of others. Our response, with few exceptions, has been to examine the incipient oligopoly and monopoly, and the builders of new centers of power - but the problems of existing power and concentration have received little attention. Surely, we have an obligation to determine whether our competitive economy is adversely affected by such existing concentration and power, and, if so, whether present

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1 / I see no need to go on at length in defense of government actions that subserve the public policies to which we claim to be committed. If it is true that, in the words of Justice Black, "the unrestrained interaction of competitive forces will yield the best allocation of economic resources, the lowest prices, the highest quality and greatest material progress, while at the same time providing an environment conducive to the preservation of own democratic * * * institutions," Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 4 (1958), then obviously anything that the enforcement agencies do to provide conditions more conducive to free interaction of market forces is in the public interest and not subject to just attack.

laws are adequate to meet the problem.

To meet this challenge, I believe that a comprehensive and systematic program of legal and economic inquiry should be established at the Federal Trade Commission to serve as the foundation of enforcement activity and, if warranted, of recommendations for statutory revision. Indeed, the FTC should become the center for continuing research into all aspects of our ever-changing economic scene to assure the proper maintenance of a free market economy. With some shift in priorities, I believe the Commission could inititate such studies within its present framework. We could also take better advantage of the wealth of talent available in the academic, financial and business communities.

The FTC has always had the authority to conduct studies and publish reports on matters within its jurisdiction, and its power to gather necessary facts is tremendous. A review of the legislative history of the Act which established the Commission discloses that economic study and reporting was viewed as one of the new Commission's primary functions. 2/ The late Senator

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2/ See Report of the House Committee on Interstate and Foreign Commerce, Report No. 533, 63rd Cong., 2d Sess., April 14, 1914, pp. 3-4.

Kefauver observed that the Commission had performed this function with outstanding success in its early days, but he bemoaned the later shift to case-by-case adjudication that brought a drying-up of the educative function that Congress had envisioned and necessarily narrowed the Commission's perspective. 3/

As the Mayor of San Francisco recently pointed out, examination of the particular problems in antitrust has been from too narrow a view. It is like standing atop Telegraph Hill in San Francisco "...looking through a telescope at only one of the spactacles, which in their whole make one of the world's breathtaking views." 4/

II.

After Chairman Dixon came to the Commission in 1961, he began to revitalize the role of the Bureau of Economics and to reinstitute the broader industry-wide (as opposed to the case-by-case) approach to enforcement problems. In a step toward broadening its own perspective, the Commission announced last month that it has directed its Bureau of Economics to undertake an in-depth investigation of the

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3/ Kefauver, In a Few Hands: Monopoly Power in America, p. 214 (1965).

4/ Alioto and Blecker, Antitrust in Galbraith's New Industrial State, XIII Antitrust Bulletin 215,217 (Spring 1968).

causes, effects and implications of the conglomerate merger movement. Incidentally, the announcement was followed the next day, I am told, by a drop in the market of some of the more glamorous conglomerate stocks. This reaction is unwarranted because the study is not intended, and should not be viewed, as the signal for an all-out offensive against the conglomerates. This is one of the unfortunate incidents of any call for a study; there will always be those who suspect that the study is sought only for the purpose of supporting arguments already accepted or conclusions already reached. Such a study would be a prostitution of the spirit of internal renewal which I feel is essential to institution of antitrust.

Our conglomerate study will include examination of the shortrun anticompetitive aspects of such mergers and the relationship between conglomerate mergers and technical or business efficiencies. It will look into the economic performance of conglomerates in the market place, and the effect of conglomerate mergers on the competitive vigor of enterprises by their change in status from independent firms to subsidiaries or divisions of conglomerates. Finally, it will examine the impact of such structural changes on long-run competitive activity. This will surely result in a report of enormous importance. It offers a perfect example of the direction in which the Commission should go.

III.

Among the studies which the Commission should direct is an evaluation of the Robinson-Patman Act and the relationship that the Act, as it has been interpreted and enforced, bears to the goals of overall antitrust policy. Surely the call for a fundamental reassessment from many men of great professional and intellectual stature requires that the Commission respond. 5/

This suggestion is certain to identify me, in the minds of some, as a foe of the Act. Although I have some concern that at times the Act is applied in a manner that may inhibit competition or penalize innovation, I am even more concerned that, as now constituted, the Act requires use of a case-by-case approach where so many of the problems are industry-wide. In such circumstances, Commission action may result in unfair competitive disadvantage to those whom we sue and frustration of Commission policy to dispose of problems on a broader basis.

I think that we have a responsibility to undertake a searching review of this law. If we find that our own interpretations of the Act have operated in a manner not intended by the Congress, we should ourselves demonstrate a willingness

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5/ See,e.g., Austern, Presumption and Percipience About Competitive Effect Under Section 2 of the Clayton Act, 81 Harv. L.Rev. 773 (1968), and Isn't Thirty Years Enough, 30 ABA Antitrust Section 18 (1966); Edwards, The Price Discrimination Law, pp. 627-57 (1959); Kaysen and Turner, Antitrust Policy, p. 239 (1965); Elman, The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal, 42 Wash. L.Rev.1 (1966).

to reassess traditional positions. On the other hand, if we find that the Act as presently written compels us to take positions which experience and reason tell us are contrary to a sound competitive economy, we must be prepared to recommend appropriate legislative revisions. Our duty requires that we enforce the law as it is written, but it does not require that we must do so in a purely passive manner, thus denying to the Congress the benefit of our practical experience in administering the law and observing its effects.

One must keep in mind that FTC economic reports were instrumental in securing the Celler-Kefauver amendments to the anti-merger law. Moreover, a recent economic report on the Webb-Pomerene Act, which concluded that the act has failed to achieve the goals envisioned for it, demonstrates that the FTC is able to objectively review statutes which it administers.

It is not difficult to think of other areas which warrant study in the suggested program. For example, it has been asserted that very important segments of our economy are dominated by firms which, without culpable collusion, operate free of market control. These firms seem to persistently exercise extensive power over price and output levels without fear of meaningful competitive response from existing or potential rivals. If such firms can operate with substantial freedom from the discipline and direction of the market

without question by the enforcement agencies, declarations concerning the claimed dedication of this country to the principles of a competitive system are rightly suspect as empty ritual or simple propaganda.

It is clear to me that the Federal Trade Commission must strive to make antitrust more relevant to our advanced industrial economy. Where violations are found, the Commission has the power under Section 5 to order far-reaching changes in the businesses and industries subject to its jurisdiction. Indeed, the outer limits of the Commission's authority under Section 5, in my opinion, have not yet been approached. So long as a given Commission action furthers the public interest in preserving a competitive market economy, I believe it will be sustained. Therefore, I think that it is within the existing authority of the Commission to create or restore the probability of competitive performance in non-competitive oligopoly industries.

To exercise this authority - and recognizing the role of market structure in determining business conduct and ultimate industrial performance - I think that the Commission should first commence studies of important and highly concentrated industries. Such studies would identify the causes for the absence of competition in the existing structures and the barriers which stand in the path of new entrants. High

barriers stand as blockades to new competition and thus assure the ability of existing market members to continue to fail to innovate, to operate inefficiently or to earn abnormally high profits, all without fear of attracting newcomers. After identification of barriers through industry-wide factual inquiry, we can enhance competition by lowering barriers significantly through administrative or adjudicative action. This seems to me to be a feasible approach to cope with the ills attending the possession of undue market power, although I do not mean to suggest that other means of enforcement should not be examined.

Any such studies should examine the present, intermediate and long-term effects which the market itself may have on these industries. Consideration must be given to external forces, such as substitute products, which may be developing. The long-term significance of the industry product or service should certainly be considered. Even if the long-term prospects of a tight oligopoly are not favorable because of other forces, any study should consider the desirability of action to free the market in the near and intermediate term. And quite clearly, of course, the establishment of industry priorities must be made as part of the planning for such an effort.

In conducting industry studies, the Commission should learn and report more about the implications of a high degree of product differentiation. At this time, I would have considerable difficulty with the suggestion that advertising expenditures should be limited as a means of lowering barriers to entry. 6/ However, I do believe that the Commission should develop the facts and, if warranted, come forward with a program to deal with heavy advertising outlays that have the effect of barring potential entrants and/or eliminating, in a predatory fashion, existing competitors.

It may be deceptive, within the meaning of Section 5, to substantially exaggerate the significance of immaterial differences between like goods. When puffing is carried to extremes, it is perhaps time for advertising to return to its traditional roles - information and education. Perhaps such a program would not only enhance meaningful competition, but would also stimulate innovation and product differences of substance which would be a legitimate object of advertising emphasis.

In addition, it would be profitable, I believe, for the Commission to look into and report on the relationship of

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6/ See, e.g., Turner, Advertising and Competition, an address before the Briefing Conference on Federal Controls of Advertising and Promotion, June 2, 1966, reported in ATRR No. 256, p. X-1 (June 7, 1966).

size to technological progress. It would be of interest to the Commission and the public to know about the comparative performance of various sized firms in discovery and implementation of innovations. I understand that some work has been done privately on the issue. I think the FTC could make a significant contribution to such a project.

Surely, if progress is our ultimate economic aim, we should get the facts about the conditions from which it is most likely to flow.

IV.

I hope these observations will contribute to a discussion and a decision to reassess our approach to certain enduring problems and to the appreciation and careful analysis of problems that are currently in the making. In areas in which economic history and empirical knowledge build a strong case for the absence of meaningful competition or indicate the development of such a condition, we do not fulfill our obligations by standing pat, or by uttering shibboleths, or by taking rash action.

We must diligently gather facts, carefully evaluate them, and swiftly and imaginatively move to remedy whatever violations they reveal. In each step we take, honesty and fairness,

rather than subservience to preconceived answers, must characterize our efforts.

A competitive free enterprise system is susceptible, in the absence of a truly effective antitrust program, to collectivism in which government seizes control of important business or important business seizes control of government.

Unless we study, reassess, and reevaluate the effects that the interplay of antitrust, the market and competition have had on our nation, we may awaken some morning to find that our opportunity to maintain a free market economy and, perhaps, a free society is gone.