



Department of Justice

ANTITRUST AND EVOLUTION: NEW CONCEPTS FOR NEW PROBLEMS

Remarks by

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I am fairly confident that by now most of you have read one or more articles or interviews regarding the "new directions" that antitrust enforcement may take over the next few years. Open up a trade journal these days--there will be some antitrust official or other glaring out at you, promising stern prosecution of competitive malefactors and bold exploration of the frontiers of antitrust and trade regulation law. What you have heard, so far, is tough talk. But these are more than threats or promises--they are signals of a significant commitment to a strong competition policy. It is tough talk that will be followed by tough action.

Today, antitrust is a popular discipline. This high level of interest in antitrust stems from a number of factors. First, the President has personally, emphatically and repeatedly, stated his commitment to the competitive market system. The President speaks, not with the perspective of a lawyer, but as a successful small businessman who has probably had more to gain, or lose, through competitive forces than most in this room. The President is asking for more reliance on competition, for deregulation where feasible, because he is convinced that this is the best economic and political course for our country. Obviously, I agree.

Another reason for the increased attention being paid to antitrust is renewed awareness of the problem of concentration of assets in the manufacturing sector. This is not a new concern: it has been voiced repeatedly from the time of the first Clayton Act, to the time of the Celler-Kefauver Amendments in 1950, through the tenure of the late Phil Hart as Chairman of the Senate Antitrust and Monopoly Subcommittee. A sense of frustration at the seeming inability of antitrust laws to deal with this concern has always been evident, but this sense is sharpened and focused when a wealthy economy such as ours suddenly develops a perception that a critical sector of it, energy production, is controlled by what seems to be a small number of gigantic corporations, extracting an ever-greater price for their essential product. Whatever the merits of that perception, as a nation we have traumatically become aware that energy is a finite, and expensive resource. We have learned that it is extraordinarily difficult to exert effective political control over all those who control energy.

In instances such as these, many look to the antitrust laws as at least a partial solution. Antitrust in this

country has always had a flavor of populism, and has frequently been seen as a means of dealing with political and social, as well as economic, problems. The antitrust laws do represent an amalgam of political, social and economic concerns; there is more to antitrust law than relevant markets and long-run marginal costs. Economic analysis must obviously be the basic vehicle for the application of the antitrust laws to particular situations, but we must not lose sight of the broader base on which those laws rest.

A third, and perhaps ironic, reason for the current level of attention is the economic travail of certain industries that feel that antitrust law contributes to their woe, either by focusing too much on them or too little on their foreign competition. More broadly, some of American industry appears to view the Antitrust Division as, at best, a chronic pain in the nether regions, and too often as a bringer of calamitous bad tidings. Even if our criminal prosecutions do not threaten the solvency of the chosen targets, the inevitable consequent private damages actions carry with them corporate fears of treble-damage judgments or a perpetual hemorrhage of legal fees to be followed by a dismal settlement to end the misery.

In short, many businessmen view the antitrust laws as a mind-numbing game which only lawyers can win. Thus, for every public cry that we should turn to antitrust to solve complex problems, there is corresponding corporate declamation that the whole notion of antitrust laws, or the way they are used, should be reconsidered.

Finally, and to me most worrisome, is the view of some that our antitrust laws have not worked, and cannot. At my confirmation hearings in August, two witnesses testified, one in favor of my nomination and the other, opposed. They both said much the same thing: the antitrust laws, and the Antitrust Division, did not seem adequate for the job. They argued that price fixing is still a common practice in many industries; that one or a tiny handful of companies dominates many of our most critical product markets; that the Clayton Act appears insufficient to stop the largest corporations from buying up everyone but their direct competitors. So, amidst exhortations that the Division reawaken to its role as the avenging angel of American commerce, I heard a note of cynicism, almost of philosophic despair, for the maintenance of a truly competitive market economy.

All of these themes--obviously somewhat inconsistent but no less disconcerting for that--have converged to create a simultaneous high expectation for, and disappointment in, the role of the Antitrust Division and the laws it enforces. I share the expectations, but not the disappointments. I don't believe antitrust law has failed, rather that it may not have fully evolved. Perhaps, like the public furor surrounding announcement of the Darwinian theory of organic evolution and its enormous challenge to established verities, the current spate of interest in antitrust law is in part a reaction to the evolutionary notions regarding its use that are now being publicly discussed. Let me touch on these evolutions and the directions I believe we need to move in if antitrust is to become even more effective.

In 1977, the challenge to the Antitrust Division is to make its enforcement activities comport with the economic realities--to see if the laws can be made to fit the problems and not vice-versa. This challenge is highlighted in two important areas of current interest.

First there is energy. The President has exhorted us to recognize and admit that an energy problem exists, and has urged Congress to adopt the societal realignments necessary if our energy-intensive economy is to survive without an ever-present danger of blackmail by foreign suppliers.

The first demand of many who seek an answer to our energy problems--or deny that they truly exist--is that we "break up the oil companies." It is to the Antitrust Division, or at least to the rubric of antitrust law, that they frequently turn for justification for these proposals. We do not, however, see the Antitrust Division as some 20th Century Luddite out to shatter indiscriminately the international oil machine. We are instead an impartial investigator of market dynamics, and an advocate of change, structural or otherwise, only where necessary to create or preserve competitive markets. A battle cry must have a rationale, and the latter should precede the former. We need answers, not slogans.

I spoke a few moments ago about evolution in society necessitating evolution in law. In the energy "industry," much of what exists today has long been present. Large, vertically integrated international producers, refiners,

and marketers are not a new phenomenon in the 1970's. The significance of the industry's structure may have changed somewhat, as the OPEC nations have either assumed outright ownership of their own reserves or have reduced ARAMCO and its counterparts to minority roles. But the refining and distribution networks are not dramatically changed in the last 5, or even 15, years.

What has changed is the awareness of petroleum as a scarce resource, and the consequent pricing of it, by OPEC and others, at five times the pre-embargo level. Both of these conditions have produced enormous effects. The President has equated our efforts to cope with those effects as "the moral equivalent of war." Public sentiment about the oil industry in particular, and energy companies in general, is distinctly negative. And most significantly, from an antitrust standpoint, the economics of energy production and distribution are now vastly different than they were only five years ago.

Stated most simply, could or would an \$8 billion Alaska oil pipeline, or a \$10 billion Alaska-Canada gas pipeline, even have been suggested at the pre-OPEC energy prices? If such projects are now economically feasible, and indeed essential, the evolutionary problem of antitrust is to understand how to encourage the forms of economic

ventures that can best create them, while preventing the possibility of monopoly pricing, cross-subsidization of competition in other markets, or common garden-variety collusion, through the vehicle of joint ventures or otherwise.

These new economic realities require new kinds of analysis and new kinds of antitrust solutions. A good example was the Division's response to the LOOP and Seadock deepwater port concept, economically feasible in large part because of the scarcity and high cost of energy. Our analysis suggested that, with prevailing and expected energy costs, including the costs of distribution, access to a deepwater port could create a substantial competitive advantage for a few competitors, which the owners could extract as monopoly profit from those using such ports. Owners could either use the offshore ports themselves and reap their monopoly profits from selling their product at the same ultimate price as sellers not having port access, or they could forego some of their own use in favor of user charges providing equivalent return. In either instance, absent the kinds of governing regulation we proposed for LOOP and Seadock on throughput and access restrictions, and terminal and pumping capacity, there was a good chance that this new

kind of venture could result in anticompetitive effects. That analysis has, of course, been heavily criticized but not yet refuted. It may be that the same analysis applies more broadly to other petroleum transportation systems. In the absence of comprehensive, enlightened and successful regulation, the analysis implies the desirability of divestiture. We are analyzing that question very closely indeed.

Of course, pipelines and ports are hardly the only important antitrust issues in the energy area. The challenge, of course, is whether the antitrust enforcement mechanism can respond to national policy needs. Obviously, national energy policy is of extraordinary importance, and if antitrust analysis can assist us in meeting such national goals, so much the better. But the Sherman Act, even innovatively enforced, is not a charter for broad social change unsupported by a competition policy analysis. Thus, ability to use the antitrust laws to carry out any social policy is limited to those actions that have a solid competition policy rationale.

For example, there is considerable pressure to justify broadscale divestiture of non-petroleum assets by oil companies, or to limit those companies to fewer steps on the vertical ladder, through the invocation of antitrust

principles. When those principles do apply--as seem to be the case in ownership of pipelines by oil producers--we will advocate divestiture. When the issues are not so clearly defined--as in cross-ownership of energy resources--we will strongly support efforts to obtain the necessary information, such as the Financial Reporting System of the President's energy plan. There is nothing in the whole field quite so shocking as the lack of adequate comparable data that would illuminate the competitive characteristics of the energy industry. But where there is no antitrust or competition policy case to be made, the burden of supporting a particular proposal must be borne by other policies, embodied in other statutes. Our job is to do the best, most perceptive analytical job possible and state our conclusions as clearly and precisely as we can.

What is crucial here is to understand that it is the logic of antitrust to which we must look--to the mandate to attack anticompetitive structure and conduct in their incipient stages--to the injunction implicit in the law to preserve not only competition, but the opportunities for competition. It is not enough, we believe, to begin and end with conventional theoretical market analysis. Rather we must discover the actual markets, and test the reality of competition beyond measurement of market shares.

We must inspect the joint ventures, individually and as a group, to discover their subtle effects on competition. We must think not only of today but of next year, and of the next century. Antitrust must more than ever be a dynamic enforcement instrument, remedying ills that exist today, and solving problems before they develop tomorrow.

Of course, involvement of the Antitrust Division in the energy field is certainly not new. The break-up of the Standard Oil trust was a seminal development in our national economic policy. The Socony-Vacuum case helped cement the notion of per se proscription of horizontal restraints. Yet, the preeminent importance of energy issues has never been as clear as it is today. Perhaps only in the Standard Oil case era could it be said that comparably evolutionary, even revolutionary, changes in American business structure were occurring.

The Standard Oil case, and indeed the Sherman Act itself, reflected a national consensus that the trusts needed busting. Today, the shrinking horizons of natural resources force us to look hard at old questions, to try to find new answers, to attack critically the most complex

economic problems we have ever had to face. Because the stakes are so high, we shall be sure that we are considering all the options and leaving no logical alternatives unexplored.

Another frontier area we need to explore is the concept of "shared monopoly." I am frequently asked to describe this creature, as though it consisted of a stated concentration ratio and a specific profit level, or some other mechanical combination of facts. Metes and bounds simply won't work here. To the contrary, "shared monopoly" is a shorthand term--nothing more and nothing less--describing a concept that embodies notions of both structure and behavior. At least when I use the term, I mean to describe those industries or markets that perform as if dominated by a single monopolist. There may be two firms, or there may be 10 or more; the industry may be very highly concentrated or only moderately so. The constant will be poor performance from an economic perspective--unexplained higher returns on investment than normal; a historical lack of new entry; and, perhaps most importantly, a tradition of interdependent conduct among the dominant firms that indicates a lack of any real competition. Of course, this performance will almost always be a function of both the structure of the industry and the affirmative volitional conduct of the individual firms that make up the industry.

We all know that this area of oligopoly behavior is one where there is substantial disagreement among economists--even more disagreement than usual in that profession. But I simply cannot accept the proposition that because we do not have unanimity, we cannot take action. If we applied that standard in other areas, quite frankly we would have little governmental action at all. We cannot always have consensus, and where we don't, we must act or not on the basis of our best judgment, after carefully considering the alternatives. Antitrust policy is not to be judged by an applause meter, certainly not one confined to reactions from the economics profession. The test--the only test--is results. On that basis, antitrust policy and enforcement have thus far failed to solve the shared monopoly problem.

Let me summarize some of the components of our thinking. The theory of the ambiguousness of "conscious parallelism", viewed in the abstract, is a statement of both economics and commonsense. But as a practical matter, we are not ready to accept that the Sherman Act cannot deal with what in some industries appears to be the inevitable consequence of oligopoly structure. Where in economics, classical or otherwise, does it suggest that supposedly competitive firms, in an industry beset

by strong foreign competition and slack demand, should respond to those circumstances by raising prices?

Some of our most important industries have done just that. I find that behavior very strange indeed.

From "conscious parallelism," let's move to what some have called "parallelism plus"--public statements intended to convey competitive information to competitors, as well as to customers or analysts, in order to influence competitive actions and reactions. I can scarcely mention what has become known as "signalling" without hearing that the Antitrust Division wants to trample the First Amendment rights of corporations, and those publications that write about and for corporations. Let me pose a simple question: if we put people in jail for "freely speaking their minds" about pricing decisions in closed rooms filled with competitors, does a special kind of First Amendment defense exist when the same conduct, with the same purpose, is moved into the open? Collusion is no less objectionable when the vehicle for agreement is a billboard or a magazine instead of the backside of a menu at an airport hotel.

These are obviously very difficult problems, both of substantive theory and evidentiary proof, and neither

I nor the Attorney General were the first to notice them or their difficulty. The problem of a few business organizations acting collectively as a true monopoly appears to fall in the interstices of the language of Sections 1 and 2 of the Sherman Act. In some cases, for example, behavior may be so interdependent that classic price fixing and bid rigging through direct personal contact are superfluous. When you only have one or a very few competitors, and all announce production and pricing plans in advance, in public forums, is traditional collusion necessary?

Viewing the conundrum from a Section 2 perspective, if a group of dominant firms maintain similar prices and terms of sale, each following the other in reducing production instead of price when demand is slack, yet all reacting to the prospect of a new competitor by bestirring themselves to momentary and highly unusual competitive conduct until the threat is driven off, what has happened that would not have happened with a "true" monopolist?

This Nation has determined that multi-firm conspiracy and single-firm monopolization are unacceptable--under certain conditions, even felonious. Is there any

conceivable reason to suppose that the drafters of such seminal legislation intended us to shy away from trying to deal with identical economic results simply because they are more complex problems? I don't think there is, and we are going to identify and deal with these very problems.

This is what I referred to earlier as evolutionary movement in antitrust enforcement. We have always been vigorous in attacking price fixing, bid rigging, and other horizontal restraints--and we will continue that effort. Just as the problems I have been discussing today are complex, price fixing is simple. Its economic effects are clear and enormously costly, and whatever resources are spent prosecuting it, wherever found, will be returned many times in economic benefits. Yet, if antitrust enforcement is to achieve its full potential, we must deal not only with the obvious but also the complex; not only with the simple but also with the difficult; not only with the undisputed but also with the uncertain. At the very least, we must try. If antitrust enforcement with its current tools is not equal to the task, we will know it, and legislative judgments can then be intelligently made.

Therefore, you can expect us to bring cases using the full reach of the available statutes to try to remedy the kinds of problems I've been talking about today. We think we can convince the courts that the Sherman Act was not meant to result in a list of simplistic and static rules attaching only to specifically defined conduct. The Sherman Act is, after all, the Magna Carta of free enterprise. As such, it must be flexible enough to deal with today's free enterprise system. The history of the Sherman Act is one of adjustment and evolution, of accomodation to changing economic conditions and concepts. That is only fitting for a legislative statement of constitutional breadth and fundamental importance in our system of jurisprudence. We will do our part in the process of giving new meaning to antitrust principles.