Department of Justice

FOR RELEASE AT
11:15 A.M., EDT
MONDAY, JUNE 3, 1957

"WHAT ANTITRUST MEANS TO THE AMERICAN BUSINESSMAN"

ADDRESS

BY

VICTOR R. HANSEN

ASSISTANT ATTORNEY GENERAL

ANTITRUST DIVISION

DEPARTMENT OF JUSTICE

PREPARED FOR DELIVERY

before the

AMERICAN MANAGEMENT ASSOCIATION

New York City, New York

Monday, June 3, 1957

I am happy to meet this morning with this distinguished group representing American business. Your organization has requested that I talk over this Department's views on such disparate topics as what guidance this Department is prepared to offer businessmen about to embark on business ventures, problems involving consent decrees and finally, the impact of antitrust on American business conduct overseas.

Before treating these issues, however, permit me one broader observation. American business has a vital stake in effective antitrust. Antitrust, to my view, is the prime form of Government action designed to obviate Government regulation. As a result, antitrust is a cornerstone of our free society.

Let me explain what I mean. Antitrust seeks to insure that all business remains responsive to competitive market pressures. This means that resources are allocated, goods produced, and wares distributed in response--not to Government-fiat--but to consumers' desires as expressed in a free market.

When markets cease to be competitive, however, history teaches that demand for Government regulation waxes. The course of Government conduct in countries like Sweden, France, and the United Kingdom bear open witness that when a given industry becomes so concentrated that the public loses confidence in its ability to express itself through free markets, government regulation, or, even worse, Government nationalization follows.

Such pressures for Government control we in this country have, with few exceptions, resisted. Here credit is due, I would urge, to the major role antitrust has played in maintaining public confidence that free markets will persist. In short, antitrust seeks to insure that competitive markets, not government regulation, guide our economic growth. In a real sense, then, antitrust is Government action aimed at avoiding necessity for Government control.

I.

This broader issue aside, I turn to the specific questions I have been asked to treat. Initially, what antitrust guidance is this Department prepared to offer the American businessman who seeks in good faith to live within the law.

Some years ago the late Mr. Justice Jackson observed: "If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom." 1/ Almost, but not quite as important, are guides in the antitrust field. The same Justice, commenting somewhat less euphemistically on antitrust laws, observed that: "One-half century of litigation and judicial interpretation has not made the law either understandable or respected." 2/

1/ Estin v. Estin, 334 U.S. 541, 553.

2/ Jackson and Dumbauld, "Monopolies and the Courts," 86 Univ. of Penna. L. Rev. 231, 256 (1938).

To ease the hazards of uncertainty and increase public respect for antitrust, Attorney General Brownell, soon after his appointment, set up a National Committee to Study the Antitrust Laws. On March 31, 1955, that group rendered its Report. Now gathered together for the first time in one place are one authoritative view, and occasionally several alternative versions, of most major decisions under the Sherman and Clayton Acts. This guide to what the law is should be of real help to those who consider what the law should be. Beyond that, the Report sought to aid antitrust enforcement by creating a useful guide to businessmen and their counsel who seek in good faith to live within the law, and, of necessity, must first know what it is.

Beyond this Report, this Division's most important tool for providing guidance is our pre-merger clearance program. Since 1953, pre-merger clearance has seemingly become increasingly important. Here some explanation of terms may be useful. By "cleared" the Department means that upon the information presently available, we do not currently intend to institute proceedings if the transaction is consummated. Thus, at the outset, clearance is based upon the accuracy and completeness of facts submitted. Should later investigation reveal facts supplied were either inaccurate or incomplete, clearance is of course withdrawn. Further, should the industry or relative market situation change after clearance, the Department reserves the right to proceed. Finally, even absent factual inaccuracy or market change, a clearance granted by one attorney general need have

no binding effect on his successor. As a practical matter, however, no Antitrust Division head has failed to honor a clearance already given.

Sometime ago, an interesting issue involving this program arose. A Congressional Committee requested from this Department the identity of firms seeking merger clearance. I realize, of course, that successful operation of our representative processes demands legislative committees have maximum access to information. In this instance, however, I felt the evenhanded and fair administration of justice required our not identifying the firms seeking pre-merger clearance. We have explained our dilemma to the Committee. We expect and hope the Congress will recognize and respect the validity of our position.

Were companies seeking pre-merger clearances to be identified, business would shun the Division's merger clearance program and this entire enforcement adjunct would collapse. This program, you will recall, the Antitrust Division instituted and maintains at the suggestion of Congress. To supplement the Division's own investigation of mergers, clearance procedures aim to encourage businessmen--voluntarily and on their own initiative--to submit proposed acquisitions before plans have ripened into final merger action or been bared to public view. A variety of obvious business reasons may prompt the businessman's desire to keep secret merger plans until acquisition has been completed. On the one hand, employee morale as

well as market acceptance of merging companies' stock may be at stake. On the other, business competitors may be tipped off in advance of the acquiring company's expansion plans. Thus, too clear for challenge is the necessity, if our clearance program is to function, for keeping such information within the Department.

Supporting this conclusion is the fact that most parties submitting proposed mergers for Division approval specify such confidentiality as prerequisite to submission. In response, Division staff as well as Assistant Attorneys General have repeatedly assured the business community such data would remain within the Department. Thus, for us to specify names of companies seeking merger approval, would be to flaunt good faith assurances relied on by parties voluntarily entering the clearance program. To violate these assurances would, in turn, debase that integrity crucial to the operation of a law enforcement agency under our representative government.

Perhaps for these reasons, from this program's very beginning, each Assistant Attorney General--without exception--had deemed it crucial to hold in strictest confidence the names of the parties involved and the details of proposed acquisitions submitted for clearance. Thus, disclosure is made by the Department only for the purpose of litigation or after the merging companies have publicly announced seeking clearance. So much for this program aimed to provide guidance for businessmen.

II.

Second, what about our consent settlement precedures? Settlement of any antitrust cause is, of course, heavily freighted with public interest. True, a consent judgment is, like a private agreement, a product of negotiation and compromise. But here all likeness ends; unlike any private agreement, a consent decree once entered embodies the essential force of a litigated judgment. As the Supreme Court put it in the second Swift case: "We reject the argument . . . that a decree entered upon consent is to be treated as a contract and not as a judicial act." The effect, the Court continued, "is all one whether the decree has been entered after litigation or by consent." 3/ To "effectuate . . . the basic purpose of the original consent decree," courts may approve modifications after entry. 4/ But if the party opposing modification can, in the language of the recent Ford case, show "actual disadvantage" or "the persistence of an inequality" stemming from change, the terms of the original decree must stand intact. 5/

With this in mind, the Division, fashioning consent judgments, frequently consults with those in the industry, both as customers and suppliers. Negotiating the recent IBM judgment, for example, we

---

3/ United States v. Swift & Company, 286 U.S. 106, 114-115.

4/ Chrysler Corporation v. United States, 316 U.S. 556, 562.

5/ Ford Motor Company v. United States, 335 U.S. 303, 322.

met with others in the industry to secure, first, a full understanding of industry problems, and industry views on effective relief, and, second, aid in understanding technical complications of tabulating and electronic data processing machines. Indeed, in one recent judgment the court declined entry until the Division could offer assurance we had obtained the views of complainants as to the effectiveness of proposed judgment provisions. Carrying this process one step further, in the various Paramount judgments specifying divestiture details, the Division publicly announced judgment provisions well in advance of submission to court. As a result, interested parties had ample notice to appear before the court and comment on proposed judgment provisions. At least in one instance an objector appeared, but the court nonetheless entered the judgment as submitted.

Regarding all these possible procedures, our view is that any rigid rule could do more harm than good. Our practice, instead, is to tailor the extent and form of consultation with other than defendants to the enforcement needs of each particular decree.

In this consent decree process, let me emphasize, Government and business alike have a real stake. To the Government, consent judgments spell, first, effective enforcement without the cost of protracted trial. Initially, the Division is caught in a vise between increasing complaints of violation and decreasing appropriations. Complaints, on the one hand, have skyrocketed: In 1952, for example, the Division received some 692 complaints, but during the last

calendar year, 1956, complaints jumped to 1240--an increase of almost 100 percent. Appropriations for current operation, on the other hand, have increased only slightly.

Sliced prosecution staffs must cope not only with more complaints of violations but also with higher evidentiary hurdles. Thus, more and more of the Division's resources are devoured by detailed market analyses required, for example, by Columbia Steel and ALCOA II, as well as by substitute products speculations which the recent Cellophane decision may be construed (improperly, we believe) to demand in certain instances. Against this background, results per enforcement dollar become a prime consideration in appraising alternative enforcement techniques.

And consent settlements do mean real cost cuts. In 1954 we researched this problem. During one sample period, for example, the average litigated case endured some 66.2 months--over five years--from complaint filing to entry of final judgment. The time lapse for consent settlements, in sharp contrast, during this same time averaged only 29.7 months--less than one-half the time for litigated cases--between complaint filing and judgment entry. Since savings in time generally spell like savings of men and resources, consent settlements mean lower costs per judgment entered. And more important, it means quicker relief to the parties adversely affected by the acts charged in the complaint.

Beyond cost savings, further advantage stems from the informality of consent negotiations. Shirt-sleeve conferences replace formal court trials; the give and take of bargaining supplants the atmosphere of an adversary proceeding. In this informal context, disclosure and discussion may resolve issues of fact proof of which would be difficult if not impossible in a contested suit. Thus, the Division may strike down violations in areas otherwise, as a practical matter, beyond its reach.

From the defendant's point of view, encouragement to enter consent judgments stems, in major part, from Section 5 of the Clayton Act. That statute permits treble damage plaintiffs to introduce final judgments or decrees, rendered in Government antitrust actions against the same defendants, as prima facie evidence of all issues determined in the prior adjudication. Exempt from its provisions, however, are judgments entered by consent before trial. Thus, defendants agreeing to consent decrees sharply cut chances of successful suits by future treble damage plaintiffs.

As a practical matter, avoidance of treble damage suits may be a real motive for defendants' entering a consent judgment. For as the latest available estimate concludes, "all of the movie litigation and approximately two-thirds of other private suits have followed successful government antitrust proceedings." 6/ Based on this

---

6/ See Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suits, 61 Yale L.J. 1010, 1060 (1952).

estimate, we gauged before the Antitrust Subcommittee of the House Judiciary Committee in July of 1955 that more than 75 percent of all private antitrust cases brought had trod a path worn smooth by Government victory.

Consent settlements may, in addition, avoid the possible adverse publicity of a protracted public trial. There a detailed pattern of abuses may be exposed to the discomforting glare of journal headlines. For example, in the recent Tennessee Electrical Contractors case, Chattanooga journals each day of the two-week trial headlined details of the defendants' alleged antitrust abuses. In that same city in the liquor cases, there was, in fact, so much comment in the public press that the court continued the imposition of sentence for two months, and on March 23, 1956, fined defendants $34,000 and placed eight on one-year probationary sentences. This had double headlines on the first page. In some instances, this publicity, largely avoidable in a consent settlement, may prove as damaging as the remedy decreed. So much for a brief sketch of consent settlement procedures.

III

A final aspect of antitrust policy suggested for discussion is the application of the antitrust laws in American overseas business operations. Many American businessmen seem to believe their foreign operations should be immune to antitrust, particularly in those countries where cartel operations are legal. They argue that antitrust subjects them to a "dual standard" not applicable to their foreign competitors.

But, unquestionably, the Sherman Act sets a principle of competitive behavior which is applicable to our foreign as to our domestic trade. In a sense, this concern is primarily with the effect of restrictive trade practice as it affects the availability of goods to be imported for the American market and the freedom of all Americans to take advantage of foreign trade and investment opportunities abroad as at home. And, as in the wartime experience with synthetic rubber, we know that international cartels may well prejudice the defense of this country, at the least by hampering development of production and technology in the United States.

In addition, our Department of State has strongly urged the end of restrictive international business practices as a part of the world's struggle for political and economic freedom. For, in retarding the increase of the free world's productivity and its standard of living, such practices thereby weaken resistance to Communism.

Enlightened business groups agree. The NAM, for example, has strongly condemned cartels. It has, moreover, campaigned against the restrictive practices which accompany cartelization--price fixing, allocation of markets and customers, production limitations and restriction on technological improvements--as repugnant to the freedom of enterprise upon which our economy is based.

Of course, antitrust, though important, is but one aspect of Government policy toward foreign commerce. Other considerations, principally questions of national security, may override the antitrust

policy in special situations. Thus, provision is made by the Defense Production Act for concerted industry action necessary to defense, although such arrangements must be strictly supervised by the Attorney General. An example is the recent Middle East Emergency Committee acting to maintain the oil supply to Western Europe. Other statutes, such as the Webb-Pomerene Act, provide limited immunities for concerted action in special circumstances. Even where no statutory immunity exists, the Department of Justice consults other interested agencies before filing cases which might affect our relations with foreign governments or our defense interests abroad.

But any exception must be limited to the need which gave rise to it. Basically, the antitrust philosophy is paramount in our foreign trade policy. Admittedly, it raises many problems as yet unresolved. Its operation may be inconvenient in some instances. Our own Department of Defense has stated that procurement overseas is complicated by this policy in those areas where restrictive practices are the rule, but it affirms its belief that the long term benefits far outweigh those inconveniences.

Let me emphasize, however, that the inconveniences are a small price to pay for the maintenance of the free enterprise system. In the main, the antitrust standard requires only the same competitive conduct abroad as at home. It has been recognized that the United States has the right to protect itself from restraints upon our foreign trade even though involving acts and agreements performed or

made abroad. The legal test of whether antitrust laws apply to any particular act or practice may generally be said to be whether or not such acts or agreements intend or have a substantial effect upon our imports, exports or domestic trade and commerce.

Antitrust enforcement is an important step in promoting international trade. Where Americans are prevented by our laws from agreeing to exclude themselves from trade in certain markets as a condition of trade in others, or where Americans invest patent rights and technological know-how abroad on the condition that they do not make future capital investments in those markets, trade is definitely restrained in the long run. Private restrictive agreements in international trade, as at home, prevent natural expansion and continual growth of trade and commerce. It would be anomalous to attempt the promotion of economic strength and stability in the free world, while at the same time allowing private restrictive agreements to undermine that policy.

IV

In sum, then, the American businessman has a very vital stake in the antitrust laws. These laws protect his liberty and his freedom to act like a businessman--they seek to keep him free from artificial restrictions imposed by group pressure and monopoly power--free from state regulation and control.

Businessmen, for their own welfare, must appreciate antitrust's role in safeguarding freedom for initiative. By pressuring for

legislative sanctuary from competition, this principal guarantee for business freedom is undermined, and will eventually be lost. Exemptions tailored to immediate problems, strict as they may seem at the moment, threaten inroads on our fundamental economic liberties. Only by cherishing these liberties and the laws which protect them, can the businessman avoid regulation, either by government, or by a monopolist or trade group which dominates his particular area of endeavor. Antitrust, then, re-emphasizes America's fundamental belief that a dynamic democracy rests secure only on the foundation of a free economy--and that economic freedom like political freedom belongs only to the vigilant.