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CONGLOMERATE MERGERS AND ANTITRUST POLICY: AN INTRODUCTION

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The questions of antitrust law raised by the recent surge of conglomerate mergers are interesting and important in themselves. But they also illuminate broader issues concerning the nature and scope of antitrust policy, and it is with those broader issues that I shall be concerned here. They are: (1) the relevance to antitrust of policies other than competition and efficiency; (2) the quality of antitrust economics; and (3) the character of the antitrust jurisprudence of the Supreme Court.

1. Eighty years after the passage of the Sherman Act, and twenty years after section 7 of the Clayton Act was amended to make it applicable to mergers, it remains unsettled whether antitrust policy is concerned solely with promoting competitive markets as an economist would understand them, or whether it has, in addition or perhaps even paramountly, other objectives. The point is arguable and argued. The Department of Justice has sought to justify its recent program of vigorous attacks upon conglomerate mergers in part by reference to the alleged human dislocations caused by such mergers,¹ and while some may deplore this emphasis, it cannot be dismissed as alien to our antitrust traditions. In one of its earliest decisions under the Sherman Act, the Supreme Court expressed solicitude for the "small dealers and worthy men" who might be harmed by low prices.² In most cases, to be sure, objectives other than competition and efficiency are introduced, as it were, decoratively. Their actual influence on outcome is in consequence unclear, but, judging from some of the outcomes, it is often not negligible.³ Whether the antitrust laws can be applied to achieve objectives unrelated, and sometimes even opposed, to the strengthening of competition thus remains an open question, mirroring the larger ambivalence toward competition in a society in which high protective tariffs could be enacted by the same Congress that passed the Sherman Act and in which the Robinson-Patman Act could be considered an appropriate amendment to the Clayton Act.

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¹ See Testimony of Assistant Att'y Gen. McLaren before the House Ways and Means Committee, in 5 TRADE REG. REP. ¶ 50,233, at 55,466 (March 12, 1969); *Hearings Before the Subcomm. on Monopoly of the Sen. Select Comm. on Small Business*, 91st Cong., 1st Sess., pt. 1A, 873, 874-75 (1969) (remarks of Att'y Gen. Mitchell).

² *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323 (1897).

³ See, e.g., *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930).

2. The injection of nonmarket considerations, as in the current conglomerate program of the Department of Justice, adds uncertainty to anti-trust policy, but one doubts whether the uncertainty would be markedly diminished by complete agreement that the only legitimate purpose of the antitrust laws is to foster competitive markets. Noneconomic concerns would enter by the back door in the choice among competing schools of economic thought. The economics profession is rarely unanimous on the great anti-trust questions. While many economists deride the notion that conglomerate mergers promote monopoly, the most articulate exponents of the notion are themselves economists: Willard Mueller, John Blair, Corwin Edwards, and others. Not being trained to umpire the debates of the economic's profession, judges invariably decide in favor of the school of thought that coincides with their own preconceptions. Moreover, whatever the state of professional economic thinking, it must be remembered that lawyers and judges are inveterate amateur economists who display little reluctance to substitute their own economic reasoning and evidence for that of the professionals.

One is therefore not surprised, although still disappointed, at the result. Capricious, rhetorical, and dogmatic "antitrust economics" (the economic concepts employed in the decision of antitrust cases) is to real economics what alchemy is to chemistry. It is conjurers' economics. Terms like "market," "oligopoly," and "concentration," which have useful meanings in professional economics, are in antitrust economics verbal flourishes that conceal rather than reveal the reasoning process leading to decision.⁴

I shall illustrate with the three economic "theories" supporting the attack on conglomerate mergers. We may call these the theories of reciprocity, potential competition, and entrenchment. The first holds that reciprocal buying (I will buy X from you if you buy Y from me) is a practice employed by large firms to destroy competitors. The logic of this proposition has never been made clear. If a firm sells in a competitive buying market, it will not purchase on disadvantageous terms in order to retain the patronage of the seller; for it can always sell at the market price. Therefore, a firm cannot use reciprocal buying to lever itself into a position of dominance in what was previously a competitive market. A monopolist (or monopsonist) can force a customer to deal with him in a different product, but, as has been demonstrated, particularly in the analysis of a closely related practice, the tie-in sale, he cannot thereby extend his monopoly.⁵ The typical replies to this argument are: (1) it assumes businessmen are rational and they are not; (2) reciprocal buying is in fact common; (3) even if reciprocal buying

⁴ On "market" see *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586 (1957); on "oligopoly" see *United States v. Container Corp. of America*, 393 U.S. 333 (1969); and on "concentration" see *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

⁵ See, e.g., Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis*, 30 *LAW & CONTEMP. PROB.* 552 (1965); Stigler, *Working Paper for the Task Force on Productivity and Competition: Reciprocity*, in 5 *TRADE REG. REP.* ¶ 50,250 (June 24, 1969).

does not lead to higher prices, it excludes competitors from the market.⁶ The first objection, if true, destroys the economic foundation of the anti-trust laws: the theory of monopoly. The second is irrelevant because the question is not whether reciprocal buying occurs, but whether it contributes to monopoly power. The third objection is irrelevant to the economic goal of antimonopoly policy, which is to assure competitive prices, not particular numbers of competitors.

The theory of potential competition, as it is articulated in complaints against conglomerate mergers, states that competition in a market is impaired when a large firm that might have entered the market is eliminated as a potential entrant by merger with one of the firms in the market. This reasoning can only be correct, however, when the firm in question is especially likely to enter the market compared with other large firms in the economy. If not, its disappearance from the ranks of potential competitors will have no effect. Relative likelihood of entry may be difficult to determine, but when it is ignored the theory is illogical. It is being ignored, notably in recent complaints attacking mergers in part on the ground that the elimination of a large firm by merger reduces the number of potential competitors in the economy as a whole.⁷

Entrenchment is a contemporary version of predatory price cutting. Adherents not only ignore the growing critical literature on such price cutting,⁸ but also are apparently prepared to dispense with the usual premise of the predation theory, evidence that the defendant has monopoly power in some other market. In its new version, the theory both uncritically ascribes crucial competitive advantages (and no disadvantages) to size, and uncritically denies the possibility that such advantages, if any, may stem from efficiency rather than from power.

If these theories of conglomerate power have any logical or empirical foundations, they have thus far been successfully concealed.

3. Ostensibly allaying but actually compounding the confusion created by uncertain ends and uncritical analytic means, the Supreme Court has shown itself increasingly disposed to resolve antitrust questions by the utterance of heroic simplicities. The habit, to be sure, is almost as old as the Sherman Act itself. In an early decision the Court appeared to declare all restraints of trade, reasonable and unreasonable, illegal per se,⁹ and in the first acquisition case it appeared to hold acquisitions between com-

⁶ Address by Assistant Att'y Gen. McLaren, in 433 ANTITRUST & TRADE REG. REP., at x-21-22 (October 28, 1969); cf. Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50, 63 n.42 (1958).

⁷ See *United States v. Northwest Indus., Inc.*, 301 F. Supp. 1066 (N.D. Ill. 1969); *United States v. Ling-Temco-Vought, Inc.*, Civil No. 69-438, 5 TRADE REG. REP. ¶ 45,069, at 52,712 (case 2045) (W.D. Pa. April 14, 1969).

⁸ E.g., Zerbe, *The American Sugar Refinery Company, 1887-1914: The Story of a Monopoly*, 12 J. LAW & ECON. 339 (1969).

⁹ *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

petitors illegal per se.¹⁰ Later, of course, the Court thought better of these rules, but it has persisted in declaring rules too sweeping and absolute to be followed in practice. It is this habit, I suppose, that has given the per se rule something of a bad odor (although all that a per se rule should properly connote is a rule of antitrust law). Boycotts are illegal per se but the Court has repeatedly sanctioned them.¹¹ Any "tampering" with the market price is illegal per se,¹² but surely not *all* market-information activities violate the Sherman Act, even though by reducing the dispersion of prices they inevitably "tamper" with price. Restrictions imposed by a manufacturer on his distributors were recently held illegal per se in an opinion that declares such restrictions to be sometimes justified, and sanctions them when imposed by a contract of agency.¹³ Horizontal, and perhaps also vertical, mergers are now, on the logic of the cases, virtually illegal per se,¹⁴ yet one is again skeptical that this will prove to be an enduring rule. The antipathy toward tying arrangements has reached the point where all package deals are suspect,¹⁵ and one is reminded — but doubtless prematurely — of Mr. Justice Holmes' warning in an early Sherman Act case against the disintegration of society into its atoms.¹⁶

The extravagant prohibitory sweep of the antitrust laws, the product of the Supreme Court's unwillingness or inability to formulate antitrust standards, goes far to explain the current assault by the Department of Justice on the conglomerate movement, as well as its declared intention of using the antitrust laws to combat organized crime.¹⁷ These enforcement initiatives are related, for they indicate an incipient politicization of antitrust policy. They are highly political issues to which the antitrust laws, with their vague but ample contours, can be made to offer the appearance of a solution. The Supreme Court has repeatedly assailed the dangers of arbitrary power. But in the antitrust field it has forged by default a powerful weapon of arbitrary law enforcement. And in so doing, it must bear a share of the responsibility for deflecting antitrust resources from the quiet but important work of maintaining competitive markets.

¹⁰ Northern Sec. Co. v. United States, 193 U.S. 197 (1904). For a plausible, but to me, unconvincing attempt to rehabilitate the opinions in the *Trans-Missouri* and *Northern Securities* cases, see Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775 (1965).

¹¹ E.g., Associated Press v. United States, 326 U.S. 1 (1945).

¹² See United States v. Container Corp. of America, 393 U.S. 333 (1969); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

¹³ United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

¹⁴ See United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Von's Grocery Co., 384 U.S. 270 (1966); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

¹⁵ See Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969).

¹⁶ Northern Sec. Co. v. United States, 193 U.S. 197, 411 (1904) (dissenting opinion).

¹⁷ See Address by Att'y Gen. Mitchell, in 5 TRADE REG. REP. ¶ 50,236, at 55,474 (March 27, 1969).