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Aristotle and Congress

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"It is best to have property private," according to Aristotle. In this manner, "industry will be increased, as each person will labor to improve his own private property." But it is also best to have the state "composed as much as possible of equals," he adds, because the "very rich" know not how to obey and the "very poor" know not how to command. Not surprisingly, therefore, he urged that "some boundary should be set to riches."[1]

These Aristotelian principles are reflected in our antitrust laws. Thereunder, property is to remain private, but certain limits are imposed upon concentration of wealth. In particular, Congress sought to place "some boundary" upon the concentration of wealth achieved by corporations through acquisitions and mergers. Accordingly, any study of the application of these laws to corporate acquisitions and mergers might commence with a review of the reasons which led Congress to adopt this legislation.

THE SHERMAN ACT

The Sherman Act,[2] enacted in 1890, limits the accumulation of wealth by private persons where such growth is achieved through an unreasonable restraint or monopolization of interstate and foreign commerce. Its provisions apply equally to internal and to external growth, as well as to individuals and corporations.

At the time that this Act was passed, it was feared that the trust and other forms of industrial combination were bringing about a dangerous concentration of economic wealth in the United States.[3] These conditions have been summarized by the Supreme Court, as follows:

> [T]he main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.[4]

Senator Sherman, in proposing legislation to cope with this accumulation of wealth, stated that "[t]hey had monopolies and mortmains of old,

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1 THE POLITICS OF ARISTOTLE, A TREATISE ON GOVERNMENT 17, 29, 33-34, 126-27 (W. Ellis transl. 1947).

2 15 U.S.C. §§ 1-7 (1964).

3 *See generally* H. THORELLI, THE FEDERAL ANTITRUST POLICY 54 *et seq.* (1954).

4 Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911).

but never before such giants as in our day."[5] He stressed that such concentration of power placed in a few hands "a kingly prerogative" inconsistent with our form of government which threatened to control not only individual markets but even state authorities in the United States, and said that, if we in this country will not endure a king or an emperor, "we should not submit to an autocrat of trade."[6]

Other congressional leaders, including those who eventually drafted the final version of this legislation, concurred in the views of Senator Sherman. While wishing to leave our economy in private hands,[7] they believed that excessive concentration of economic power had to be curtailed. Eventually, therefore, they turned to certain well-known common-law principles which condemned both undue restraints and the monopolization of trade, and decided to apply these principles to the trusts and combinations which were thought increasingly to control our industries. Accordingly, the Sherman Act was enacted for the purpose of declaring that any restraint or monopolizing of interstate or foreign commerce, of a nature proscribed by the common law, was thereafter to be a federal crime.

> Broadly stated, this law prohibited, under severe penalties, every contract or combination in restraint of interstate or foreign commerce, and every monopolization or attempt to monopolize the same, and provided additional remedies, including suit in equity by the Federal Government, to restrain such combinations, and action at law for triple damages by private parties injured thereby. By this law, therefore, acts which at common law were invalid, were made criminal offenses so far as they related to commerce among the States and with foreign nations, while special remedies were established both at law and in equity.[8]

The 1890 curb placed by Congress upon concentration of wealth in our economy, therefore, was essentially a federal fence located upon familiar old common-law boundaries. It did not condemn size, bigness or even power per se; but it did proscribe the use of unreasonable restraints or monopolization to achieve and/or exercise the same. In this manner, the law continued in "one shape," with "custom perched" upon its fence posts to induce compliance with its statutory commands. Under its provisions, normal corporate expansion, whether internal or external in form, might continue; but abnormal growth, achieved through unreasonable restraints or monopolization of trade, was barred.

The Clayton Act

Section 7 of the Clayton Act,[9] as enacted in 1914, placed a more limited curb upon the concentration of wealth in interstate and foreign commerce.

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5 21 CONG. REC. 2460 (1890).
6 21 CONG. REC. 2457 (1890).
7 H. THORELLI, *supra* note 3, at 226.
8 J. DAVIES, TRUST LAW AND UNFAIR COMPETITION 10 (1915).
9 15 U.S.C. § 18 (1964).

Its provisions were directed solely at growth by corporations through stock acquisitions.

Early in the second decade of the present century, Congress became convinced that corporations were expanding through stock acquisitions at a rate which threatened to recreate, via the route of holding companies, the trusts and combinations previously condemned by Senator Sherman. Accordingly, it decided to single out and prohibit any stock acquisition by a corporation where a showing could be made that its effects "may be" to bring about a Sherman Act violation. As explained in the Senate Report recommending the enactment of this new legislation:

> Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890, or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation. Among other of these trade practices which are denounced and made unlawful may be mentioned . . . holding companies. . . .[10]

Section 7 in its original form, however, was ineffective. As the Federal Trade Commission (FTC) subsequently reported, corporations merely continued their allegedly alarming rate of growth through the alternative device of asset acquisitions. Indeed, the Commission claimed that through this device, giant corporations were being formed which tended to become private super-governments with the power to dominate — although not necessarily to monopolize — both individual industries and the overall economy. Accordingly, it recommended that "the rapid growth of private super-government in industry must be halted."[11]

The Commission explained that these corporate acquisitions of assets were of three types: horizontal (between competitors), vertical (between supplier and customer), and conglomerate (all others). In particular, it claimed that conglomerate transactions were creating corporate giants possessing the power to destroy small business:

> Perhaps the most important danger which is inherent in these conglomerate organizations is the economic power which they can wield over a large number of different industries. Threatened with competition in any one of its fields of enterprise, the conglomerate corporation may sell below cost or may use other unfair methods in that field, absorbing its losses through excessive profits made in its other lines of activity, all rationalized in the name of "meeting competition". . . . There are few greater dangers to small business today than the continued growth of the conglomerate corporations.[12]

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[10] S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914).

[11] FEDERAL TRADE COMMISSION (FTC), REPORT ON THE PRESENT TREND OF CORPORATE MERGERS AND ACQUISITIONS 23 (1947).

[12] *Id.* at 13.

The Commission subsequently supplied detailed statistics in a series of reports intended to document its contention that corporate growth through asset acquisitions and mergers was bringing about an alarming concentration, both in individual industries and in the economy as a whole, "dominated by the over-all economic power of a small number of giant corporations,"[13] and recommended specifically that section 7 of the Clayton Act be amended to apply a uniform legislative brake upon both stock and asset acquisitions on the part of large corporations. The Commission was convinced that there "must be some effective means of preventing giant corporations from steadily increasing their power at the expense of small business."[14]

In short, a further boundary upon the concentration of wealth was urged upon Congress. The Commission recognized, as did Newton, that one can see further "by standing upon the shoulders of Giants"; but it insisted that such Giants should be self-made through internal growth, rather than, as the Commission alleged, Frankenstein-fabricated by means of mergers.

THE CELLER-KEFAUVER ACT

In 1950, the Celler-Kefauver Act[15] amended section 7 of the Clayton Act substantially in the manner recommended by the FTC. Its provisions limit the acquisition by corporations of either the assets or the stock of other corporations engaged in interstate or foreign commerce. Its provisions are intended to apply to all types of such corporate acquisitions, namely, horizontal, vertical, and conglomerate.

Prior to the amendment, influential voices in Congress had been echoing the contentions of the Commission that further concentration of corporate control over our economy, whether arising from asset or stock acquisitions, must be halted. Indeed, Senator O'Mahony, asserting that a trend to this effect harbingered the socialization of industry, questioned the sort of world in which we preferred to live.[16] Eventually, a majority in Congress came to share in this alarmist point of view. For example, during the Senate debate on the bill, Senator Aiken went so far as to urge passage of the proposed legislation partly on the ground that "[t]he concentration of power, either economic or political, in the hands of a few persons is a breeder of weakness, discontent, and, finally, revolution."[17]

The House and Senate Reports, in recommending the passage of the proposed legislation, based their conclusions upon alleged findings that "large" corporations had been increasing their size relative to small businesses in a manner to cause a high level of concentration both generally

13 FTC, REPORT ON THE CONCENTRATION OF PRODUCTIVE FACILITIES 14 (1949).

14 FTC, REPORT ON THE MERGER MOVEMENT 69 (1948).

15 Act of Dec. 29, 1950, ch. 1184, 64 Stat. 1125.

16 *Hearings on H.R. 2357 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 79th Cong., 1st Sess. 5-6 (1945).

17 96 CONG. REC. 16,503 (1950).

"in the American economy" and specifically "in individual industries."[18] The extent to which the American economy had purportedly become "concentrated and centralized in the hands of a few giant corporations" was stressed.[19] The stated purpose of the contemplated statute, accordingly, was "to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions."[20]

The House *Report* explained in some detail how the new Act was intended to apply to mergers and acquisitions. Congress did not seek to inhibit such external growth, even by large corporations, where no adverse effect upon competition was threatened. Its provisions, rather, were "intended to permit intervention . . . when the effect of an acquisition may be a significant reduction in the vigor of competition."[21] The Act was to be applied rigorously, however, whenever such external growth could be shown to result (a) in a substantial increase in industrial concentration, (b) of a nature as would, in turn, represent a substantial danger to vigorous competition in some market or markets. Illustrations of such proscribed mergers and acquisitions were then listed:

> [1] [Horizontal:] elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition . . .
> [2] [Vertical:] establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete . . .
> [3] [Conglomerate:] increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive. . . .[22]

Charts illustrating the three types of mergers were then annexed, and the statement was repeated that the "same principles" would apply equally to horizontal, vertical and conglomerate transactions.[23]

The *Report* emphasized, in conclusion, that the proposed legislation sought to prevent future acquisitions resulting in a substantial increase in industrial concentration — where representing a substantial threat to vigorous competition — because of the fear of the attendant "concentration of great economic power in a few corporations."[24]

The additional 1950 boundary erected by Congress, it follows, again restricts, although it does not prohibit, all future growth by large companies through acquisitions and mergers. Economists may reason from statistical analyses that such a statute erects too high or too low a barrier to this form of external growth.[25] In approaching antitrust, however, the "heart has its

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18 H.R. Rep. No. 1191, 81st Cong., 1st Sess. 2-3 (1949).
19 S. Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950).
20 *Id.*
21 H.R. Rep. No. 1191, at 8.
22 *Id.*
23 *Id.* at 11.
24 *Id.* at 13.
25 *Compare* 1968 Presidential Task Force Report on Antitrust Policy, 115 Cong.

reasons which reason knows nothing of." Concentration of wealth in our large corporations may seem modest to some minds when measured by the percent shared by these corporations in our expanding national economy; but it may simultaneously appear hazardous to some hearts when magnified by the power of these giant concerns over smaller competitors struggling to share in this economy. In any event, in the United States, as in Athens, those who decide may be "fools" and those who discuss may be "wise"; but it is the former and not the latter who "decide."

STATUTORY INTERPRETATION

The legislative intent of Congress in enacting our antitrust laws, in the manner described herein, may or may not have been effectuated in the precise phrases of the resulting prohibitory provisions. Indeed, there are many who claim that, though the legislative spirit was willing, the statutory flesh was weak. Should it be assumed that the will of Congress has been sufficiently reflected in its words, however, the following conclusions are necessarily reached with respect to the application of these laws to corporate mergers and acquisitions.

First: Any *horizontal* acquisition or merger whereby a large, viable company acquires a substantial, viable competitor, or a series of small companies representing the equivalent of a substantial, viable company,[26] is prohibited. This conclusion is reached because, on the one hand, it reduces to a substantial degree the available competition and, on the other, increases the share of the market held by the survivor. Thus, and to this extent, industrial concentration is increased in the market in which the parties had previously been competing.

Second: Any *vertical* acquisition or merger whereby a large, viable company acquires a substantial, viable supplier or customer, or a series of small companies representing the equivalent of a substantial viable customer,[27] is also proscribed. This result is reached because it deprives their rivals of a fair opportunity to compete in a substantial share of the market, and increases the aggregate assets of the surviving company in comparison with those of its competitors. Here, industrial concentration is again, and to this degree, increased in the line of commerce in which the parties formerly had been engaged.

Third: Any *conglomerate* acquisition or merger whereby a large company goes beyond a transaction which has a neutral effect upon competition as, for example, mere diversification or an investment in another industry, and instead obtains an advantage which threatens to be decisive over competitors of the acquiring or acquired company, is likewise forbidden. This reasoning is based upon the fact that a transaction which gives to the sur-

REC. 5642 (daily ed. May 27, 1969) *with* 1969 PRESIDENTIAL TASK FORCE REPORT ON PRODUCTIVITY AND COMPETITION, 115 CONG. REC. 6472 (daily ed. June 12, 1969).

26 H.R. REP. No. 1191, at 8; S. REP. No. 1775, at 5.

27 *Id.*

viving company a significant increase in economic power to restrain or to monopolize trade in one or more of the markets or lines of commerce in which it competes, likewise represents a substantial threat to a free, competitive economy. It would seem to be irrelevant that this increased concentration of power, if it could be exercised, is or is not in fact exercised.

It should again be stressed, however, that the legislative intent in imposing curbs upon corporate acquisitions and mergers was to curtail only transactions "that are economically significant."[28] Thus, small companies, "which cannot produce the specified effect upon competition," were to be free to merge.[29] Again, failing companies were to be "allowed to sell" even to a competitor.[30] With all due humility, it is submitted that Capitol Hill had no intent to proscribe any de minimis acquisition — such as a merger between a manufacturer of dehydrated onion and garlic and a wholesaler of processed food — where no significant increase in industrial concentration results, and any alleged increase in economic power is shown to be illusory.[31]

The reader must now consult other sources for analyses of the legislative language, their judicial interpretation, and the application of each to specific acquisitions and mergers. This paper does not purport to consider anything beyond the intent of Congress in enacting these laws. It is respectfully suggested, however, that the reader might take with him his knowledge of the historical background of these statutes to guide his steps as he proceeds in further research. Bench and bar can best approach the words of the statutes by viewing them as "mere counters," useful only in making their "reckonings," but having no value as legal currency independent of the light thrown upon them by their history.

A lawyer without history or literature is a mechanic.

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28 S. REP. No. 1775, at 5.
29 H.R. REP. No. 1191, at 8.
30 *Id.* at 6; S. REP. No. 1775, at 7.
31 *See* FTC v. Consolidated Foods Corp., 380 U.S. 592, 600 (1965).