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ANTITRUST LAW AND ADMINISTRATION: A SURVEY OF CURRENT ISSUES

A STUDY

PREPARED FOR THE USE OF THE

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LETTERS OF TRANSMITTAL

DECEMBER 14, 1976.

To the Members of the Joint Economic Committee:

Transmitted herewith for the use of the Members of the Joint Economic Committee and other Members of Congress is a study entitled "Antitrust Law and Administration: A Survey of Current Issues," prepared by Mr. Julius W. Allen, a consultant to the Economics Division of the Congressional Research Service, Library of Congress.

This study provides a comprehensive and up-to-date appraisal of our antitrust laws and procedures in light of the increasing public awareness of the problems associated with concentrations of private economic power. It is one of a series of monographs being prepared to commemorate the 30th anniversary of the Employment Act of 1946. In the course of this series, a wide range of economic issues is being examined in an attempt to develop improved means to achieve the goals of the Act. Other studies focus on problems of employment, inflation, economic growth, planning, and monetary and fiscal policy, among other issues.

The Committee wishes to thank Mr. Allen for his work on this study and the Congressional Research Service for its funding and support.

The views expressed in this document do not necessarily represent those of the Joint Economic Committee, individual members of the Committee, or its staff.

Sincerely,

HUBERT H. HUMPHREY,
Chairman, Joint Economic Committee.

DECEMBER 9, 1976.

Hon. HUBERT H. HUMPHREY,
Chairman, Joint Economic Committee,
U.S. Congress, Washington, D.C.

DEAR MR. CHAIRMAN: Transmitted herewith is a study entitled "Antitrust Law and Administration: A Survey of Current Issues," prepared by Mr. Julius W. Allen, consultant to the Economics Division of the Congressional Research Service, Library of Congress.

In this monograph, Mr. Allen undertakes a comprehensive review of antitrust issues including (1) the major provisions of the antitrust laws and our experience with these provisions in combating instances of excessive market power; (2) newer issues of antitrust policy, including those raised by conglomerate firms, multinational firms, financial intermediaries, and the problem of bigness itself; and (3) proposals to remedy deficiencies in existing antitrust laws and administration and in available data on corporate operations.

Publication of this paper provides a new assessment of these issues at a time when they are becoming matters of increasing concern to the Congress and the public.

Sincerely,

JOHN R. STARK,
Executive Director, Joint Economic Committee.

CONTENTS

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ANTITRUST LAW AND ADMINISTRATION: A SURVEY OF CURRENT ISSUES

By **Julius W. Allen***

I. INTRODUCTION

The main purpose of this paper is to provide a perspective on the impact on the economy of antitrust law and policy, and a survey of alternative recommendations intended to make antitrust policy more effective. The paper, in addition to introduction and conclusion, has the following sections: (1) a survey of the principal antitrust laws and their administration, as well as other legislative and administrative actions that have a direct bearing on monopoly and industrial concentration; (2) assessments of the impact of antitrust law and enforcement on the national economy; (3) some of the problem areas in antitrust including conglomerates, the issue of bigness, multinational corporations, political influence of large corporations, and the influence of financial intermediaries; (4) deficiencies of data and analysis; and (5) proposed approaches and solutions to antitrust and monopoly issues.

A. General Assessments of Antitrust

At the outset it is striking to note how widely divergent general assessments of antitrust laws are, ranging from those holding antitrust legislation to be the indispensable legal framework for our private enterprise system to those viewing it as a useless fiction if not a sham and a fraud.

Thus, for example, Justice Thurgood Marshall in 1972, in United States v. Topco Associates, Inc., speaking for the Supreme Court stated that "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedom." [1] Similarly Dean Neil H. Jacoby, of the University of California at Los Angeles and a member of the Council of Economic Advisers under President Eisenhower, wrote in 1974: "Historically, antitrust has contributed importantly to the maintenance of effective competition." [2] Milton Handler, reviewing in 1973 twenty-five years of antitrust, concluded: "One characteristic of recent decisions, . . . is the virtually unanimous agreement as to the validity of our antitrust goals. At age 82, the Sherman Act has a redoubtable vigor. There is no reason why arrangements or practices subversive of competition cannot be totally eliminated." [3] Only slightly less positive was Donald

*Economic consultant, Economics Division, Congressional Research Service, Library of Congress.
[1] 405 US. at 619 (1972).
[2] Jacoby Neil H., Antitrust or Pro-competition? California Management Review, v. 16, Summer 1974: 54.
[3] Handler, Milton. Twenty-five Years of Antitrust. (25th Annual Antitrust Review.) Columbia Law Review, v. 73, March 1973: 449.

Dewey of Columbia University, writing in the International Encyclopedia of the Social Sciences: "At present writing [1968], the policy of using antitrust legislation to discourage economic concentration has almost no influential critics in the United States. So long as limitations on corporate size do not impose discernible handicaps on American firms in their competition with foreign rivals, this situation is unlikely to change." [4]

On the other hand, negative assessments are given by, among others, the liberal Harvard University economist, J. K. Galbraith, and the conservative political scientist of New York University, Irving Kristol, as follows:

Galbraith, in his "Economics and the Public Purpose," wrote, in 1973:

> The antitrust laws are now eighty years old; aside from some more recent legislation on mergers the basic structure of law is nearly sixty years old. Nothing has yet happened to arrest the development and burgeoning power of the technostructure. A firm may, on occasion, be forbidden the acquisition of another firm; it may, on occasion, be required to divest itself of a subsidiary. But for more than half a century, if already large, it has been wholly secure in its existing size and almost wholly secure in further growth. Thus the remedy that emerges from the neoclassical model is harmless. It presents no threat to the power or autonomy of the technostructure or to its affirmative interest in growth. . . . From the standpoint of the technostructure and the planning system the antitrust laws are admirably innocuous.[5]

In the fall of 1975, Irving Kristol wrote:

> The populist response to the transformation of capitalism by the large corporation was, and is: "Break it up." Anti-trust and anti-monopoly legislation was the consequence. Such legislation is still enacted and re-enacted, and anti-trust prosecutions still make headlines. But the effort is by now routine, random, and largely pointless. . . . Just how much difference, after all, would it make if AT & T were forced to spin off its Western Electric manufacturing subsidiary, or if IBM were divided into three different computer companies? All that would be accomplished is a slight increase in the number of large corporations, with very little consequence for the shape of the economy or the society as a whole.[6]

Nor is the middle ground vacant. Thus Simon Whitney of New York University wrote in 1973: "To summarize, antitrust policy serves useful functions, even if it could be improved; but the urgent and pressing problems are found elsewhere—from the environment right through inflation." [7] Peter Asch, of Rutgers University, in the final chapter of his 1970 volume, "Economic Theory and the Antitrust Dilemma," concludes:

> American antitrust policy can be interpreted partially as a commitment to the status quo. A survey of the various branches of antitrust indicates that, whatever its positive accomplishments may be, it has not often been a vehicle for sharp change. Indeed, it may be said to resist change effectively. It appears that the courts and the federal agencies have been reluctant to tamper with existing firms and markets almost as a matter of ethical principle.[8]

And finally, Justice Abe Fortas stated, in picturesque language:

> We expect antitrust enforcement to have specific form and symmetry; to have discernible design and pattern and dimensions; and to fit some kind of an eco-

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[4] Dewey, Donald. Antitrust Legislation. International Encyclopedia of the Social Sciences. 1968 v. 1 p. 356.

[5] Galbraith, John Kenneth. Economics and the Public Purpose. Boston, Houghton Mifflin, 1973, p. 121 216.

[6] Kristol, Irving. On Corporate Capitalism in America. Public Interest, No. 41, Fall 1975: 129–130.

[7] Whitney, Simon. Anti-Trust—Cost and Benefits. In: Backman, Jules (editor). Business Problems of the Seventies. New York, New York University Press, 1973, p. 119.

[8] Asch, Peter. Economic Theory and the Antitrust Dilemma. New York, Wiley, 1970, p. 400, 401.

nomic framework. But antitrust does not turn out a well articulated, carefully defined, finished product. By its nature, it produces something which is misshapen, bumpy and bulgy—and which at best serves to shield us somewhat from the foggy, foggy dew.[9]

B. Limitations in Ability To Assess the Role of Antitrust

This diversity in assessment of antitrust law and administration makes it clear that considerable clarification is needed as to what antitrust is all about, and, more specifically, how it affects our economy, as best we can judge it.

At the outset, we need to be aware of certain factors that limit our ability to make such an assessment of the role of antitrust.

First, as the views expressed above already suggest, antitrust law and administration are by no means clear, definite and unswerving in their course. Parts of the law tend to blunt the anti-monopoly provisions of other parts of the law. Court interpretations have had a major impact in determining the legality of particular business practices and forms of business organization, and have caused the law to have quite a different practical meaning at one time from what it had at another. Administration has been vigorous at times and lax at others, but almost always highly selective in its targets. This vacillation is perhaps a reflection of the ambivalence in the attitude of the American people historically toward bigness and success in business. As the historian, Richard Hofstadter, has noted, "Americans have always had to balance their love of bigness and efficiency against their fear of power and their regard for individualism and competition." [10]

Second, the government itself is in many ways supportive of monopoly and thwarts competition. The law has permitted numerous exemptions from antitrust coverage. Neil Jacoby has recently noted: "When one aggregates all the wage and price determinations untouched by the antitrust laws, it is evident that a major fraction of the nation's GNP is generated outside of legal restraints against monopoly." [11] The exemptions from coverage by antitrust law include export associations under the Webb-Pomerene Act of 1918; cooperative farm production and marketing associations under the Capper-Volstead Act of 1922 and subsequent legislation; labor unions under the Clayton Act of 1914 and subsequent legislation;[12] major aspects of the price behavior of government regulated firms, including railroads, other transportation companies, communications companies, other public utilities, and insurance companies; as well as some professional sports; and many local trades and professions subject to license or other local or State control.

In addition, monopoly is furthered by tax provisions, such as those encouraging mergers, and by trade barriers against imports from foreign countries.

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[9] Fortas, Abe. Remarks at American Bar Association. Section on Antitrust Law, Proceedings of the Annual Meeting. Chicago, Illinois, August 11-13, 1963, p. 325.

[10] Hofstadter, Richard. What Happened to the Antitrust Movement? In: Cheit, Earl F. (editor). The Business Establishment. New York, Wiley, 1964, p. 131.

[11] Jacoby, Neil H. Antitrust or Pro-competition? California Management Review, v. 16, Summer 1974: 54.

[12] This exemption does not extend to secondary boycotts, to collusion with unionized employers to fix end product prices, or to driving non-union firms out of business.

A particularly graphic illustration of government abetting restraints to competition is provided by Walter Adams' ticking off the variety of aids provided by the government to the oil industry as follows:

> The Bureau of Mines in the Department of Interior publishes monthly estimates of the market demand for petroleum (at desired prices, of course), thus establishing a national production quota. Under the Interstate Oil Compact, approved by Congress, these estimates are broken down into quotas for each of the oil-producing states which, in turn, through various prorationing devices, allocate "allowable production" to individual wells. Oil produced in violation of these prorationing regulations is branded as "hot oil," and the federal government prohibits its shipment in interstate commerce. Also, to buttress this output-restriction and price-maintenance scheme against potential competition, the government protects the industry with a tariff of 10.5 cents per barrel on crude oil and with import quotas (belatedly suspended in May 1973). Finally, to top off these indirect subsidies with more visible favors, the government authorizes oil companies to charge off a 22 percent depletion allowance against their gross income, to "expense" their intangible drilling costs, and to apply their foreign tax and royalty payments as an offset against their obligations to the United States Treasury.[13]

As Franklin R. Edwards has recently stated:

> Although government regulation of industry and markets occurs for many reasons, its effect is frequently to circumscribe competition. In many instances the scope of regulation is much broader than that required to accomplish its intended purpose. In other cases regulation is typically used to foster and protect cartels or trade associations. Business-instigated government intervention is often the most effective and least costly way for an industry to monopolize. All this is not to say that market concentration is not an important source of monopoly power, but only that government regulation may be an equal or more important source of such power.[14]

It is not to be gainsaid that some of this government intervention with anti-competitive effects may nonetheless have substantial social justification. But changing conditions make it desirable to reevaluate such provisions of law and government policy. Certainly there are numerous cases, for example, where intervention justified by natural monopoly conditions at one time is no longer warranted as such monopoly has receded. This is argued to be the case with aviation and other modes of transportation and in some parts of the communications industry.

Further, as will be noted in more detail below, some of the antitrust laws themselves, notably the Robinson-Patman Act, and the resale price maintenance laws (recently repealed) have had the effect of contracting the area of effectiveness of other antitrust laws.

Third, although antitrust is probably the element of government policy that focuses most directly on curbing monopoly and enhancing competition, it is by no means the only weapon in the government's arsenal designed to achieve these objectives. Taxation, price control, government regulation, and even public ownership and moral suasion contribute in varying degrees towards reaching the same goals as antitrust.

Finally, market forces—changes in supply or demand due to countless reasons and political and social changes at home and abroad—may well have a greater impact on the extent of monopoly and concentration than the total of government actions. All of these factors interact upon one another. Thus it is rarely possible to make a definitive assessment of the impact of a single factor on economic welfare.

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[13] Adams, Walter. Corporate Power and Economic Apologetics: A Public Policy Perspective. In: Industrial Concentration: The New Learning. Boston, Little, Brown, 1974, p. 370.

[14] Edwards, Franklin R. Concentration, Monopoly, and Industrial Performance: One Man's Assessment. In: Industrial Concentration: The New Learning, p. 437.

II. LEGAL STRUCTURE OF ANTITRUST

A brief overview of current antitrust law, its administration, and its interpretation by the courts is presented as background for the assessment of the impact of antitrust and the recommendations for its revision which follow.

The Acts to be considered are the Sherman Act of 1890, the Clayton Act of 1914, the Federal Trade Commission Act of 1914, the Robinson-Patman Act of 1936 amending the Clayton Act, the Miller-Tydings Act of 1937 amending the Sherman Act, the Celler-Kefauver Act of 1950 amending the Clayton Act, and the McGuire Act of 1952 amending the Federal Trade Commission Act. Of these seven Acts the first three are the basic statutes designed, along with the Celler-Kefauver Amendment, to promote competition and to restrain monopolistic behavior. The other three Acts provide for certain reins on competition in the interest of protecting existing competitors.

A. Laws To Promote Competition

At the time of their enactment, the first three laws were virtually unique in the industrial nations of the world, and were largely responsible that the direction of growth of the economy of the United States was quite different from that of the largely cartel-dominated economies of much of Europe. It was only after World War II that antitrust laws along the American model reached significant proportions in western Europe.

1. *Sherman Act of 1890*

The Sherman Act is the most basic of American antitrust statutes. It has two key substantive sections. Section 1 declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." Section 2 makes every person guilty of a misdemeanor who "shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations."

Without tracing the entire history of the judicial interpretation of these two sections, and at the risk of drastic unbending of the convoluted change of such interpretations, one may fairly conclude that the basic trend in interpreting these two sections has been highly dissimilar. The proscription in Section 1 of contracts, combinations, and conspiracies in restraint of trade has been generally interpreted as outlawing per se all agreements among competing firms to fix prices, to restrict output, to share markets on a predetermined basis, or to use other means directly to restrict the force of competition, regardless of how otherwise justifiable such restraints of trade might be argued to be. Judicial problems arise where the same effects are achieved without specific agreements.

On the other hand, Section 2, the provision against monopolizing, has been subject to a "rule of reason" for most of the time since the Standard Oil case of 1911,[1] especially until the Alcoa decision of 1945.[2] Under this interpretation by the Supreme Court, proof of monopolization is not per se sufficient grounds for finding a firm in violation of Section 2; but such monopolization must be proved to be unreasonable or contrary to the public interest.

The per se doctrine of Section 1 prohibiting price fixing was clearly spelled out as early as 1897 in the Trans-Missouri Freight Association decision [3] where Justice Peckham for the majority of the Supreme Court stated:

> When the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to the kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.

With differing emphases the per se principle was reinforced in the Addyston Pipe and Steel case in 1898,[4] the Trenton Potteries case in 1927 [5] and the Socony Mobil case in 1940.[6] The court was explicit in the Socony Mobil case in stating:

> For over forty years the Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interpreted as a defense.
>
> Any combination which tampers with price structures is engaged in an unlawful activity. . . . Congress . . . has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies.

Further, as Frederic M. Scherer notes in his Industrial Market Structure and Economic Performance (1970):

> Included under the per se prohibition have been not only express price-fixing agreements, but also conspiracies with a more subtle impact on price, such as agreements to restrict output, to divide up the market into exclusive spheres of influence, to allocate customers by seller, to follow standardized pricing formulas or methods, and to boycott or exclude from the market firms which refuse to abide by industry-pricing norms.[7]

This prohibition of price fixing per se is not, however, as absolute as it might appear. For example, until their repeal in 1975, the Miller-Tydings and the McGuire Acts permitted the enforcement of State and local resale price maintenance laws.[8] Under such laws manufacturers of trade-marked items could set a floor under which retailers were not permitted to sell their goods. The Webb-Pomerene Act exempted price-fixing and other agreements from antitrust prohibitions where they involved solely export market sales. The Reed-Bulwinkle Act of 1948 exempted collective rate setting practices of common carriers from antitrust prohibitions, so long as such rates were approved by the Interstate Commerce Commission. There are also

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[1] U.S. v. Standard Oil Co. of New Jersey et al., 221 U.S. 1 (1911).
[2] U.S. v. Aluminum Co. of America et al., 148 F. 2d 416 (1945).
[3] U.S. v. Trans-Missouri Freight Association, 166 U.S. 290 (1897).
[4] U.S. v. Addyston Pipe and Steel Co. et al., 85 Fed. 279 (1898).
[5] U.S. v. Trenton Potteries Co. et al., 273 U.S. 392 (1927).
[6] U.S. v. Socony-Vacuum Oil Co. et al., 310 U.S. 150 (1940).
[7] Scherer, Frederic M., Industrial Market Structure and Economic Performance. Chicago, Rand McNally, 1970, p. 432.
[8] Discussed further on pp. 15–16.

considerable areas of uncertainty where specific price-fixing agreements do not appear to exist but where parallel pricing policies, often involving one firm acting as price leader, have the same effect as actual price-fixing agreements.

The prohibitions in Section 2 against monopolizing, attempting to monopolize, or conspiring to monopilize have, generally, been more elusive and difficult to deal with than the price-fixing practices under Section 1. In the first place, size in itself or virtual absence of competition in and of itself, is not illegal. Under many circumstances, monopoly itself is not outlawed. Public utility monopolies and monopolies derived from unequal efficiency in production or organization, or superior quality of product, are not illegal. It is monopolization, not monopoly per se, that is illegal.

The courts have been wrestling with the question of determining what constitutes monopolization under the broad mandate of the Sherman Act ever since the Act was passed. During the first two decades after passage of the Sherman Act the courts and the executive branch were loath to proceed forcefully against existing trusts. Not until 1911 was a clearcut decision against monopolization reached, in the Standard Oil of New Jersey case.[9] Here the courts found that Standard Oil had illegally monopolized the petroleum refining industry, and ordered the dissolution of the company. In a similar case the same year, the American Tobacco Company was ordered to be dissolved.[10] Decisions by the Supreme Court in both cases applied a rule of reason setting forth a distinction between "good" and "bad" trusts. In 1920 United States Steel Corporation was found to be a "good" trust.[11] There the majority of the court concluded that U.S. Steel had not monopolized in the sense of a violation of the Sherman Act. Even if it had monopoly power, the company had not been found by the court to exercise such power. Therefore dissolution was not required for the greatest consolidation in modern American industrial history. The U.S. Steel decision against the government and a similar one upholding American Can Company against a Justice Department suit [12] led to a hiatus of 25 years in any significant action in attacking monopoly under Section 2.

The post-World War II years have, however, witnessed several cases which provide evidence that Section 2's dormancy was not to be eternal. In 1945 a three-member panel of Circuit Court judges, with Judge Learned Hand presiding, reversed a lower court which had upheld Alcoa against Justice Department charges of monopolization.[13] Judge Hand concluded that Alcoa by building up production capacity and reserves in advance of demand "meant to keep, and did keep, that complete and exclusive hold upon the ingot market with which it started. That was to 'monopolize' that market, however innocently it otherwise proceeded," [14] A key factor in Judge Hand's decision was a determination as to which market was relevant for determining the extent of Alcoa's share. The District Court had agreed with Alcoa's contention that its share of the aluminum market was 33 percent. But Judge Hand, by defining the market much more more narrowly

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[9] U.S. v. Standard Oil Co. of New Jersey et al., 221 U.S. 1 (1911).
[10] U.S. v. American Tobacco Co., 221 U.S. 106 (1911).
[11] U.S. v. United States Steel Corporation, 251 U.S. 417 (1920).
[12] U.S. v. American Can Company et al., 230 Fed. 859 (1916).
[13] U.S. v. Aluminum Co. of America et al., 148 F. 2d 416 (1945).
[14] Ibid., p. 432.

(including only primary and not secondary ingot production, for example), found Alcoa's share to be 90 percent, enough in the court's view to constitute a monopoly. This case made it possible "to infer illegal monopolization without evidence of predatory or otherwise unreasonable practices driving competitors from the market".[15] It was the first major case to turn on the definition of the relevant market as a key factor in determining whether a firm occupied a monopolistic or oligopolistic position within an industry. This issue of the size of the market has been central to court decisions on monopoly power ever since.

The monopolization thrust of the Alcoa decision was further strengthened by the decision a few years later in the case against several motion picture exhibition chains in which Justice Douglas, speaking for the majority of the court, stated: "A monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under Section 2 even though it remains unexercised." [16] Similarly the United Shoe Machinery Supreme Court decision of 1954[17] found the company guilty of monopolization because certain of its business practices, such as requiring leases of its machinery and refusal to sell, although not objectionable per se, had the effect of preventing new entry and perpetuating the firm's dominance in the shoe machinery business.

However, since that time, there appears to have been some pulling back from the positions enunciated in the immediate postwar period. Notably in the 1956 DuPont case,[18] the reasoning in the Alcoa case was reversed. Here the Supreme Court found the company not guilty of monopolizing cellophane production, largely on the basis that the relevant market was deemed to be flexible packaging materials generally (a wider market), and not solely cellophane (a narrower market), as the Justice Department had been arguing.

Currently interest is focused on the suit brought by the Justice Department against the International Business Machines Corporation. It is the largest antitrust suit ever brought to trial. The Justice Department is arguing that IBM is resorting to illegal monopolization tactics in the data processing industry. Even though the case was initiated in January 1969, it did not come to trial until May 1975 and a district court verdict cannot be expected before 1977 at the earliest. Already, however, one may confidently assume that this case, like the DuPont, Aluminum and many others, will turn largely on how widely or narrowly the market for the company's products and services is defined.

The Antitrust Improvements Act of 1976 (see pp. 35–36 below) while not altering the substance of the Sherman Act may be helpful in increasing the ability of the Justice Department to enforce it.

2. *Clayton Act of 1914*

The Clayton Act of 1914 was passed as the result of a widespread disillusionment with the Sherman Act, its apparent inability to come to grips with particular anticompetitive practices, and the feeling that

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[15] Scherer, op. cit., p. 460.
[16] U.S. v. Griffith Amusement Co., 334, U.S. 100, 107 (1948).
[17] U.S. v. United Shoe Machinery Corporation, 347 U.S. 521 (1954).
[18] U.S. v. E. I. duPont de Nemours and Co., 351 U.S. 377 (1956).

it was ineffective in combating the trusts and combinations that were growing rapidly at the turn of the century. The most important provisions of the Clayton Act are the following.

Section 2 prohibits such price discrimination as would "substantially lessen competition or tend to create a monopoly in any line of commerce." This section was amended significantly by the Robinson-Patman Act of 1936, to be discussed below. Section 3 prohibits tying contracts and exclusive dealing restrictions which adversely affect competition. Section 7, in many ways the most important in the Act, prohibits mergers where their effect may be "to substantially lessen competition" or "tend to create a monopoly in any line of commerce." It was relatively ineffective until 1950 when the Celler-Kefauver Amendments closed serious loopholes in the law, as noted below, pp. 10–12. Section 8 prohibits interlocking directorates among directly competing firms. This provision was not vigorously enforced before 1968. It also does not affect indirect interlocks in which a director of a firm (often a financial institution) holds seats on boards of two or more other companies that do directly compete with each other.

The "loopholes" in the original Section 2 of the Clayton Act were substantial since price discrimination due to differences in grade, quality or quantity of commodity sold was exempt. These loopholes were closed, at least partially, by the Robinson-Patman Act enacted in 1936. However, as noted below (pp. 14–15), difficulties of interpretation and enforcement remain.

The prohibitions in Section 3 against tying contracts, requirements contracts, exclusive dealing and exclusive dealer franchises, have been interpreted and clarified by the courts in the 60 years since passage of the Clayton Act. Essentially each of these practices represents a kind of limitation of competition, but their proscription has been qualified in specific cases. For example, as Frederic Scherer points out in the case of tying agreements:

> Violation will not be found unless there is monopoly power in the tying market or unless a substantial volume of sales is foreclosed in the tied good market, and for relatively small firms producing unpatented products, these conditions are not likely to be satisfied. Small companies attempting to break into a new market under the protection of tying contracts may also escape censure. . . . The law also does not reach tying arrangements which are purely voluntary and informal—i.e., when customers habitually buy a machine producer's special supplies in the belief that the machine will thereby function more effectively, or because it is more convenient, and not because the machine maker refuses to sell or lease machines without a supply contract.[19]

In addition, manufacturers of intricate or special equipment have been generally successful in requiring dealers not to sell or install repair parts from competing firms.

Similarly, requirements contracts, under which a buyer agrees to purchase all his requirements for some commodity or group of commodities from a single seller, stand a good chance of being judged legal if they are negotiated by sellers possessing a small share of the relevant market.

Thus far, there has been no serious attempt to encourage automobile dealers to handle vehicles of more than one manufacturer. While it is illegal for dealers to agree among themselves not to infringe upon

[19] Scherer, op. cit., p. 506, 507.

each other's sales territories, it is not illegal for a manufacturer to limit the number and location of outlets to which franchises are granted.

The difficulties in determining the legality under both the Sherman and the Clayton Act of particular franchise arrangements are well illustrated in the 1963 White Motor case [20] in which the Supreme Court declared that it did not "know enough of the economic and business stuff out of which these arrangements emerge" to determine whether they stifle competition or whether they may be "the only practicable means a small company has for breaking into or staying in business." In this case the Supreme Court remanded the case to the district court for a more thorough exploration of the facts. The case, however, never came to trial since it was settled by a consent decree under which White Motor Company agreed to terminate the restrictive provisions of its franchise agreements.

Public policy with respect to mergers has had a lengthy and complex evolution. Many mergers that have decided economic advantages and appear to be in the public interest are accepted without controversy. Others have such a clearly adverse effect on competition as to require their being prohibited. As a practical matter, most mergers fall in between these limits of the legal spectrum, making for extensive litigation and for difficult decisions as to which mergers to prosecute, especially in view of the limited resources of the Justice Department and the Federal Trade Commission compared to those of the merging firms.

Merger cases have been considered under both the Sherman and the Clayton Acts. The successful resort to Section 1 of the Sherman Act has been infrequent since, as interpreted by the courts, the law requires proof that a merger would have the effect of achieving substantial monopoly power and thus of an *actual* substantial lessening of competition. Under the Clayton Act, proof is only required that the merger *may* substantially lessen competition.

Section 7 of the Clayton Act originally provided "that no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce where the effect of such acquisition may be to substantially lessen competition. . . ." This section was almost totally ineffectual since it did not prohibit one corporation from acquiring a competitor's assets. This loophole was closed with the passage of the Cellar-Kefauver Amendment of 1950. The passage of this Act had an immediate effect on the ability of the Federal Trade Commission and the Department of Justice to prosecute successfully cases against proposed mergers.

As a result there has been a nearly blanket prohibition of horizontal mergers with substantial shares of the market and of vertical mergers likely to foreclose an appreciable share of some market. The determination of what constitutes a relevant market and what percent of that market is to be considered to have substantial anticompetitive effects has been at the heart of most key merger decisions since 1950, including notably the Bethlehem-Youngstown case,[21] the Brown

[20] White Motor Co. v. U.S. 372 U.S. 253 (1963).
[21] U.S. v. Bethlehem Steel Corp. et al., 168 F. Supp. 576 (1958).

Shoe case,[22] the Pabst Brewing case,[23] the Rome Cable-Aluminum Company of America case,[24] and the Continental Can-Hazel Atlas case.[25]

As Frederic Scherer has pointed out, "these decisions together suggest that when one firm acquires a competitor with 3 percent or more of sales in some relevant market, and when the combined market share exceeds 20 percent, the probability of judicial disapproval approaches unity. And mergers may be prohibited when they involve much smaller market shares, if the industry has a history of rising concentration." [26]

Nor are alleged economies in such mergers considered an acceptable defense. As the Supreme Court clearly stated in the Philadelphia National Bank case:

> We are clear that a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude . . . has been made for us already, by Congress when it enacted the amended Section 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.[27]

The success of the government in limiting anticompetitive horizontal and vertical mergers has not carried over into conglomerate mergers which have grown significantly, especially since 1968. Since conglomerate mergers by definition involve companies operating in different markets, the rationale against such mergers rests more on a broader interpretation of economic power than that required in a consideration of horizontal and vertical mergers. It has yet to be decided whether the provisions of the Celler-Kefauver amendment will be interpreted by the courts broadly enough to encompass purely conglomerate mergers or whether additional legislation will be needed.[28]

Finally, it should be recognized that the Celler-Kefauver Act allows for exemptions from its provisions for mergers approved by the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission, the Interstate Commerce Commission, the Securities and Exchange Commission, the United States Maritime Commission, and the Secretary of Agriculture. While the competitive aspects of mergers were to be considered by the regulatory agencies, such consideration has often been deemed by the courts to be secondary to other public policy interests. As the Supreme Court ruled in the 1965 Seaboard Airline case, "It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings that such a merger would be 'consistent with the public interest.' " [29]

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[22] Brown Shoe Co. v. U.S., 370 U.S. 294 (1962).
[23] U.S. v. Pabst Brewing Co., et al., 384 U.S. 546 (1966).
[24] U.S. v. Aluminum Co. of America et al., 377 U.S. 271 (1964).
[25] U.S. v. Continental Can Co. et al., 378 U.S. 441 (1964).
[26] Scherer, op. cit., p. 481.
[27] U.S. v. Philadelphia National Bank et al., 374 U.S. 321, 371 (1963).
[28] Further discussion of conglomerate mergers follows below, pp. 24–27.
[29] Seaboard Airline Railroad Co. et al., v. U.S. et al., 382 U.S. 154, 156–57 (1965).

77-976—76——3

A more stringent position came to be taken in the case of bank mergers, when the Supreme Court in 1963 declared that the Celler-Kefauver Act standards were fully applicable to bank mergers.[30] Congress consequently passed the Bank Merger Act of 1966 which allowed the Comptroller of the Currency to approve mergers after finding that the anticompetitive effects of the merger are "clearly outweighted in the public interest by the probable effects of the transaction in meeting the convenience and needs of the community to be served."

However, in 1967, the Supreme Court again upheld the Celler-Kefauver Act criteria as applicable in deciding whether competition would be substantially lessened in bank mergers and stating that the merger partners had the burden of proving that anticompetitive effects of the merger were clearly outweighed by its advantages.[31] Although subsequent cases have sustained challenges to bank mergers by the Justice Department—even after they have been approved by the Comptroller of the Currency [32]—the Court has, recently, been applying a more lenient anticompetitive standard in order to sustain the legality of certain bank mergers.[33]

The difference in focus of the Sherman and Clayton Acts, as reflected especially in their interpretation by the courts, has been noted above (p. 10) and also by several scholars. Thus, for example, Earl Kintner states that "except in the area of per se violations, the Sherman Act is not violated unless *actual* and substantial adverse competitive effects have been proved. With the Clayton Act, on the other hand, illegality can be found in conduct which has the *probable* result of substantially lessening competition." [34]

Similarly, Peter Asch writes:

> Competition and monopoly are treated primarily as phenomena of conduct under the Sherman Act and structure under the Clayton Act. The Sherman Act tends to deal with flagrantly anticompetitive practices often promulgated by firms holding substantial market power; the Clayton Act, on the other hand, deals more with borderline practices that may not be inevitably anticompetitive, and with mergers whose effect may be to create substantial market power when it did not previously exist. . . . Under present construction of the Sherman Act, an effectively monopolized industry need not violate the law; whereas under the Clayton Act, events that reflect competition may be said to lessen competition if they damage the interest of some firms. This does not imply that the laws in general work poorly, but it does indicate that our legal system has not yet come to grips with some rather basic questions.[35]

The difference noted by Asch may also reflect a disposition in many courts to refrain from restricting major existing corporations, at least in part for fear of disrupting efficiencies that are believed to be integral to present size and management; whereas the same kind of restraint does not pertain to proposed mergers. Here greater weight seems to be placed on the likely adverse effect on competition by a merger than on possible gains in efficiency.

This dual approach led the economist William G. Shepherd to note, in 1970, that "there have been almost no direct efforts during the last 15 years to reduce concentration, only to restrain its rise

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[30] U.S. v. Philadelphia National Bank et al., 374 U.S. 321, 371 (1963).
[31] U.S. v. First City National Bank of Houston et al., 386 U.S. 361 (1967).
[32] E.g., U.S. v. Phillipsburg National Bank, 399 U.S. 350 (1970).
[33] E.g., U.S. v. Connecticut National Bank, 418 U.S. 656 (1974); and U.S. v. Marine Bancorporation 418 U.S. 602 (1974).
[34] Kintner, Earl W. An Antitrust Primer (2nd edition). New York, Macmillan, 1973, p. 22 (Italics in the original.)
[35] Asch, Peter. Economic Theory and the Antitrust Dilemma, p. 392–393.

through merger. This double standard towards mergers and existing concentration has had the effect of acquiescing in the positions of the established leading firms in highly concentrated industries." [36] Further he wrote, "If the dissolution of existing firms (however dominant their position) has now virtually disappeared from the antitrust arsenal, it is largely because of its potential downward impact on share prices." [37] Finally, "though one would be unduly harsh to call it a 'charade', antitrust policy has now largely acquiesced in, and therefore ratified, existing market structure." [38]

This view coincides with that of Peter Asch, already noted above (p. 2) when he wrote in 1970 that "it appears that the courts and the federal agencies have been reluctant to tamper with existing firms and markets almost as a matter of ethical principle." [39]

3. *Federal Trade Commission Act of 1914*

The third of the basic antitrust acts, the Federal Trade Commission Act, was designed to provide more effective investigative and adjudicatory functions necessary for more adequate implementation of the Clayton and Sherman Acts than was felt could be performed by the Department of Justice's Antitrust Division. The Act established the Federal Trade Commission, consisting of five commissioners, as an independent, quasi-judicial agency, to complement the enforcement effort of the Department of Justice and, under Section 5, to prohibit "unfair methods of competition." It was thus expected that the FTC would develop special competence in evaluating the structure and functions of American business in the interest of maintaining competition. Its investigatory functions have provided the basis for a number of remedial trade acts, including the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, and the Celler-Kefauver Act of 1950.

Under its broad mandate, the FTC has taken action against such practices as:

> price fixing, boycotts, exclusive dealing and tying agreements, price discrimination, mergers, bribing the employees of vendors and customers, exerting reciprocal purchasing leverage, business espionage, disseminating derogatory information about rival products, harassing competitors through protracted patent and other litigation with predatory intent, selling products below cost with predatory intent, selling merchandise by means of lotteries, and luring large number of rival employees to break their employment contracts.[40]

What has come, since 1938, to be its largest single function is its work against false and misleading advertising. This has been done under provision of the Wheeler-Lea amendment of 1938 which extended the responsibility to the FTC to combat "deceptive acts or practices in commerce."

It is clear from this list of its activities that some overlapping of jurisdiction between the Federal Trade Commission and the Department of Justice has been unavoidable. Both the Justice Department and the FTC may institute civil actions against violations of the

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[36] Shepherd, William G. Market Power and Economic Welfare. New York, Random House, 1970, p. 20.
[37] Ibid., p. 101.
[38] Ibid., p. 166.
[39] Asch, Peter, op. cit., p. 401.
[40] Scherer, op. cit., p. 517.

Sherman and Clayton Acts. In practice, there appears to be little duplication, both because the areas in which each agency functions are so broad and resources so limited that each agency tends to confine its efforts to cases it deems most important at the time and because the FTC also has a broad mandate to oppose fraud and misrepresentation outside the antitrust area. Usually the two agencies work well together. Neither starts an investigation without clearing it with the other. Price discrimination cases under the Robinson-Patman Act are usually prosecuted by the FTC. The FTC also handles most investigations of the food and textile industries, while the Antitrust Division almost always handles cases involving the steel industry.

B. Antitrust Laws To Protect Competitors

While the preponderance of the antitrust legislation is clearly on the side of preserving and extending competition as a national policy, there are within the antitrust legal framework acts which would limit the full impact of competitive forces.[41] The most important of these are the Robinson-Patman Act, the Miller-Tydings Act and the McGuire Act.

1. *Robinson-Patman Act of 1936*

Probably the most controversial of all the antitrust laws and the one most widely criticized by economists, by and large, is the Robinson-Patman Act. Dirlam and Kahn call it "one of the most tortuous legislative pronouncements ever to go on the statute books."[42]

Condemnation of Robinson-Patman is not unanimous, however. Thus Earl Kintner wrote:

> If we did not have a Robinson-Patman Act, it would be necessary to invent one. The imperviousness of the Act to amendment is a significant indication that it was and is a response to a definite need. Therefore, however much we may decry the law's defects, we must recognize that a broad consensus supports its two primary objects:
>
> 1. To prevent unscrupulous suppliers from attempting to gain an unfair advantage over their competitors by discriminating among buyers.
> 2. To prevent unscrupulous buyers from using their economic power to exact discriminatory prices from suppliers to the disadvantage of less powerful buyers.[43]

The genesis of the Robinson-Patman Act is clear. The 1920's and 1930's witnessed the rapid rise in the growth of chain stores in several lines of retailing, which was accompanied by increasing hardship for and frequent failures of smaller independent businesses. Since much of the advantage of the chain stores was seen in their ability to pressure suppliers into granting them substantial price concessions, and to cut prices selectively in order to put independent rivals out of business, there was great pressure to take legislative action which would help redress the balance. The Robinson-Patman Act of 1936 was the result.

The principal provisions of the Act may be summarized as follows:

> Section 2 a, the heart of the Act, prohibits sellers from discriminating in price in sales of goods of "like grade and quality," except when justified by differences in cost.

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[41] Other legislation limiting competition, such as regulatory legislation mentioned above, is significant, but outside the main focus of this report.

[42] Dirlam, Joel B. and Alfred E. Kahn. Fair Competition, the Law and Economics of Antitrust Policy: Ithaca, Cornell University Press, 1954, p. 119.

[43] Kintner, Earl W., op. cit., p. 61.

Section 2 b provides that price discrimination is not unlawful if made in good faith to meet an equally low price of a competitor.

Section 2 c prohibits the payment of brokerage commissions, or allowances or discounts in lieu thereof, except where actual brokerage services are provided.

Section 2 d and e prohibit a seller from granting discriminatory allowances and services and facilities to a buyer unless such assistance is made available to other competing buyers on equal terms.

Section 3 prohibits a seller from providing certain secret allowances to the buyer and forbids territorial price reductions or sales at unreasonably low prices where the seller's purpose is to destroy competition or to eliminate a competitor.

The problems of determining when discrimination is illegal, how to interpret "good faith" of a firm in meeting the price of a competitor, and what are accepted differences in costs, have defied solution in any broad sense. The Federal Trade Commission, charged with the enforcement of the Act, has not been able to achieve a clear-cut direction in its policies under the Act.

The legal and economic difficulties with the Act were clearly portrayed by Kaysen and Turner, as follows:

> In its language, legislative history, and application, the [Robinson-Patman] Act has run into three important dilemmas. First, its basic purpose has not been clear: it points in two directions. One is the suppression of discrimination as an anticompetitive practice; the other, the protection of small individual firms from price disadvantages in their transactions in the market. . . . The second dilemma is that it has concentrated its attention on price differences rather than on price discrimination. . . . Finally, and perhaps most important, the Act creates an administrative dilemma of formidable proportions: on the one hand, the Commission must set a standard which is enforceable, which requires some precision; on the other, it must pay some attention to practicalities, which requires some looseness and discretion. The most difficult area in which this dilemma arises is that of cost justification. . . . The difficulties of defining what constitutes meeting of competition in "good faith" are also formidable.[44]

Nonetheless, attempts to amend or repeal the Act have been vigorously, and thus far successfully, resisted. As recently as the fall of 1975, the Department of Justice prepared proposals to repeal or substantially amend the Robinson-Patman Act. This evoked creation of an Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters of the House Committee on Small Business. Its hearings between November 5, 1975 and March 23, 1976, were devoted very largely to support of the Act and opposition to amending it to any significant degree.

2. *Resale Price Maintenance Laws*

The two Federal resale price maintenance laws, the Miller-Tydings Act and the McGuire Act, can be dealt with summarily since the Consumer Goods Pricing Act of 1975, passed in December 1975, repealed their provisions. Resale price maintenance laws allow manufacturers to enforce the minimum prices at which their trade-marked products may be sold at retail. In the 1930's, retailers, hard-pressed by depression and growing competition from chain stores and dis-

[44] Kaysen, Carl and Donald F. Turner. Antitrust Policy, an Economic and Legal Analysis. Cambridge, Harvard University Press, 1959, p. 181-182.

count operations, convinced several State legislatures to pass State resale price maintenance laws. This covered only intrastate transactions, however. To be effective on an interstate basis, the Congress was persuaded in 1937 to pass the Miller-Tydings Act which amended Section 1 of the Sherman Act, exempting from antitrust prohibition contracts prescribing minimum prices for the resale of trademarked goods sold "in free and open competition with commodities of the same general class produced or distributed by others" where such contracts were authorized by State law. The Federal law proved ineffective when, in 1951, the Supreme Court ruled that it exempted only express contracts to prescribe minimum prices on goods in interstate commerce and was not binding on non-signing retailers. This loophole, from the point of view of resale price maintenance advocates, was closed by the McGuire Act which permitted enforcement of resale price maintenance on non-signers where State laws permit. However, inflationary pressures and the success of discount houses and other retail outlets offering goods in competition to fair-trade items led to the repeal of fair trade laws in many States and the recognition that they were a form of price fixing that was having a perceptibility adverse effect on consumer purchasing power. Repeal has been achieved with only slight protests and with little impact on retail trade.

III. ASSESSMENT OF THE IMPACT OF ANTITRUST LAWS AND ENFORCEMENT

A. Impact on the Economy

For reasons that have already been suggested above (pp. 1–3), there have been relatively few attempts at empirical assessment of the impact of antitrust laws on the economy. Virtually without exception the attempts that have been made have been considered, even by their authors, as tentative and relatively inconclusive.

Perhaps the first significant attempt at such an evaluation was made in 1966 by George Stigler. In his article, "The Economic Effects of the Antitrust Laws," published in the Journal of Law and Economics, he reached the following conclusions:

> The substantive findings of this study are meager and undogmatic:
> 1. The Sherman Act appears to have had only a very modest effect in reducing concentration.
> 2. The 1950 Merger Act has had a strongly adverse effect upon horizontal mergers by large companies.
> 3. The Sherman Act has reduced the availability of the most efficient methods of collusion and thereby reduced the amount and effects of collusion.[1]

He adds that "even the strongest [of the above conclusions] (on the effects of the anti-merger statute) is not overpowering in the volume or pointedness of the evidence." [2]

However, it seems unlikely that one will find sharp demurrals from Stigler's conclusions. During the decade since Stigler's article, economists and others have noted that even if the evidence of impact of antitrust laws on concentration is meager, incomplete, and at times contradictory,[3] it is clear that certain specific practices have been effectively curbed. Stigler speaks of the reduction in the amount and effects of collusion. Shepherd states:

> Cooperation has been reduced and altered. Formal cartel agreements have mostly been eliminated. What remains is covert, more fragile, and mainly among lesser firms in lesser industries.
>
> The strict line against cooperation appears to be close to the optimal—*where* it applies.[4]

Scherer notes that the United States, unlike nearly all other industrialized Western nations, has adopted an antitrust policy which holds explicit price-fixing and output-restricting agreements per se illegal, without regard to their reasonableness.[5]

The consensus that certain anti-competitive practices have been effectively stopped or diminished has an important corollary that is implied in the statements just cited—namely, that although specific

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[1] Stigler, George J. The Economic Effects of the Antitrust Laws. Journal of Law and Economics, v. 9, October 1966: 236.

[2] Ibid., p. 237.

[3] Difficulties in measurement of concentration are discussed on pp. 32-34.

[4] Wilcox, Clair and William G. Shepherd. Public Policies Toward Business. 5th ed. Homewood, Illinois, Richard D. Irwin, 1975, p. 285. (Italics in original.)

[5] Scherer, F. M. Industrial Market Structure and Economic Performance, p. 453.

trade practices have been outlawed, circumventing the discipline of competition has commonly been achieved by other means. This is well stated by Scherer as follows:

> The law is more permissive with respect to subtler forms of conduct which could have the same effect as explicit agreements. Oligopolists refraining from price competition because they recognize the likelihood of rival retaliation do not violate the law as long as their decisions are taken independently. And by avoiding any suggestion of encouraging or compelling rivals to cooperate, they may also facilitate uniform and non-aggressive pricing through such devices as price leadership and open price reporting systems. These limitations in the law prevent the reign of competition from being carried as far as it might conceivably be.[6]

Some of the proposals to erase these limitations are considered in Chapter VI of this report.

In a similar vein, Peter Asch has written:

> Prosecution under Section 1 of the Sherman Act . . . has tended to penalize formal and overt conspiracy, but has been far more lenient with informal and tacit forms of parallel business behavior. It is therefore conceivable that although some firms have abandoned collusive patterns that they know to be illegal, they have simply substituted different patterns that, although more "legal", are no less collusive. The law may not have induced greater independence in decision making, but rather may have forced firms to adopt relatively difficult and inefficient methods of collusion. If this has in fact been the case, then the economic implications of Sherman Act enforcement may be rather limited.[7]

A different approach to measure the impact of antitrust law was taken in 1970 by Richard Posner of the University of Chicago Law School, based on statistics of cases and proceedings before the Department of Justice and the Federal Trade Commission.[8]

He suggests that inadequate planning and inefficient enforcement in these agencies have seriously curtailed the impact on the economy these agencies might otherwise have. Thus he concludes:

> So far as I am able to determine, the Department of Justice, to take the most distinguished component of the antitrust enforcement system, makes little effort to identify those markets in which serious problems of monopoly are likely to arise; except in the merger area, does not act save on complaint; makes no systematic effort to see whether its decrees are being complied with; keeps few worthwhile statistics of its own activities—and none on those of other components of the enforcement system; does not have adequate records of the criminal and civil penalties imposed on the defendents in its cases; makes no systematic effort to identify repeated violators of the antitrust laws; routinely prosecutes all reported per se violations, including agreements to fix prices that, considering the nature of the product and the conspirators' market share, are almost surely unsuccessful attempts; and is, in short, inappropriately run as a law firm, where the workload is determined by the wishes of the clients (in this case mostly unhappy competitors, aggrieved purchasers, and disgruntled employees), and where the social product of the legal services undertaken is not measured.[9]

Three years later, William F. Long, of the Federal Trade Commission, Richard Schramm of Cornell University, and Robert Tollison of Texas A&M University published a study, based in part on Posner's data on Federal antitrust activities, in which they attempt to determine whether cases are brought where they could be expected to have the most impact on economic welfare.[10]

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[6] Ibid., p. 453.
[7] Asch, Peter. Economic Theory and Antitrust Dilemma, p. 395.
[8] Posner, Richard A. A Statistical Study of Antitrust Enforcement. Journal of Law and Economics, v. 13, October 1970: 365–419.
[9] Ibid., p. 419.
[10] Long, William F., Richard Schramm, and Robert Tollison. The Economic Determinants of Antitrust Activity. Journal of Law and Economics, v. 18, October 1975: 559–574.

To this end, the authors make a comparison between a benefit-cost model of desirable antitrust behavior and actual antitrust activity. Although with considerable qualifications, the authors found that, on the basis of models tested, economic variables could account for at best 60 percent of cases brought by antitrust agencies. Of the industry economic characteristics that were a factor in determining antitrust case bringing activity, the most important was found to be industry size, as measured by sales. Less important in explaining antitrust activity were variables more closely measuring actual or potential monopoly performance, such as profit rate on sales, concentration, and aggregate welfare losses.

Thus Posner's conclusions were provided with more substantial rational underpinnings.

More recently two articles in the October 1975 issue of the Journal of Law and Economics provide further qualifications to the results of Posner and Long and his co-authors. John Siegfried, in "The Determinants of Antitrust Activity," [11] makes several changes in the empirical tests of Long et al., based on different less aggregated data sources, mostly from Internal Revenue Service Corporate Income Tax Return data for 1963. Siegfried confirms that industry sales appear to be a strong variable in explaining antitrust activity, but that the direction of its effect is not stable across alternative models. Basically, Siegfried finds that "economic variables have little influence in the Antitrust Division." [12]

Siegfried suggests that the reason for the lack of influence of economic variables in antitrust activity may lie in the reward structure confronting decision makers in the Antitrust Division. This structure makes it "probably more important to win cases than to reduce economic losses or inequities in order to move up the success ladder in the Justice Department." [13] He concludes further: "The absence of a measure of the deterrent and bargaining effects of the Antitrust Division's winning percentage in trial cases may well omit the most important sources of economic benefits produced by antitrust activity." [14]

A different modification of the conclusions of Long et al. was reached by Peter Asch in an article, "The Determinants and Effects of Antitrust Activity." [15] He explored further than Long et al. the role of industry size as a determinant of casebringing patterns. He concludes "that the effect of industry size on antitrust activity is in a sense attributable both to numbers of firms and to average size of firms within industries. In addition, these factors interact such that the effect of either depends directly on the level of the other." [16]

More fundamentally, he believes that "casebringing activity cannot be characterized as predominantly 'rational' or predominantly 'random' on the basis of the industry variables examined." [17]

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[11] Siegfried, John J. The Determinants of Antitrust Activity. Journal of Law and Economics, v. 18 October 1975: 559–574.
[12] Ibid., p. 573.
[13] Ibid., p. 573.
[14] Ibid., p. 573.
[15] Asch, Peter. The Determinants and Effects of Antitrust Activity. Journal of Law and Economics, v. 18, October 1975: 575–581.
[16] Ibid., p. 580.
[17] Ibid., pp. 580–581.

These studies by Posner, Long et al., Siegfried, and Asch all suggest that decision making and procedural deficiencies in the Department of Justice and the Federal Trade Commission may have been fully as responsible as weaknesses in the law or the impact of judicial decisions for the limited impact antitrust has apparently had on the economy.

B. Lack of Measurable Impact on Market Concentration

Most economists would probably agree that while antitrust laws have had an impact on the pattern of business behavior, curtailing some of the most blatant anti-competitive practices—this is particularly true in the case of horizontal mergers that tend to create a substantial degree of monopoly—there is no evidence that they have had any measurable effect on the amount of market concentration in the economy.

Why has this happened? First, it seems clear that antitrust laws understandably lag behind changes in business structure and practices. Most such laws are geared to deal with business conditions of one or more generations past. They are ill-adapted to deal with such phenomena as the wave of conglomerate mergers of the 1960's, the growth of multinational corporations, the increasing resort to joint ventures, and the rising influence of financial intermediaries. They are geared to a concept of monopolization that matches poorly actual oligopolistic behavior in many large firms.

As Corwin Edwards has recently pointed out, our legal antitrust concepts focus on monopolization practices of the big enterprise, rather than upon the impact of the large firm on the conduct of its competitors. Thus:

> the concept became a bad fit for the types of concentrated power that are more numerous and, in the aggregate, more important than monopolization. The concept is not extensive enough to cover instances in which the big enterprise has significantly preponderant influence that falls short of control. Such instances are common. Competitors of the big enterprise are intimidated, not by its threatening conduct, but by their own awareness of what it could do and their desire not to provoke it to do that.[18]

He concludes, therefore, that:

> our legal controls are not adequate to prevent the big from attaining such degrees of influence over many smaller enterprises that the latter become quasi vassals. With brands, access to credit, and expertise in technology and in marketing skills concentrated in the large enterprise, these can be used by that enterprise to establish relationships with small firms, especially with distributors, that incrementally deprive the latter of ability to do without the help of the former. The present status of franchising illustrates how far such relationships can be carried and how numerous they are. Although such phenomena probably have contributed substantially to concentration of the authority to make decisions, and the whole process has been under continuous antitrust scrutiny, the antitrust laws have been and can be applied only to limited aspects of them.[19]

C. Difficulties of Measuring Impact

One of the basic reasons why a valid assessment of antitrust law and enforcement on the economy is so elusive lies in the unknown and probably unknowable deterrent effect of these laws. Just as the value of the cop on the beat probably is greater in terms of the extent to

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[18] Edwards, Corwin D. Policy Toward Big Business; What Lessons After Forty Years? Journal of Economic Issues, v. 9, June 1975: 349.
[19] Ibid., p. 352.

which his presence deters committing of crime than in the number of arrests he makes, so the chief usefulness of antitrust laws may rest in their impact on decisions of corporate executives to forego actions that would violate antitrust law. This conclusion has been stressed by many analysts and students of antitrust. Thus Peter Asch, for example, writes: "The finding of illegality in one merger is not in itself so important as the possibility that one hundred other mergers may be abandoned or never contemplated seriously because of that ruling."[20] The thought is reflected in that adage that "the ghost of Senator Sherman sits at the board table of every large corporation." Similarly, in 1964, the historian, Richard Hofstadter, wrote:

> It is one of the strengths of antitrust that neither its effectiveness nor its ineffectiveness can be precisely documented; its consequences rest on events of unknown number and significance that have *not* happened—on proposed mergers that may have died in the offices of corporation counsel; on collusive agreements that have never been consummated; on unfair practices contemplated but never carried out.[21]

In greater detail, Justice Abe Fortas noted:

> The non-visible part of antitrust is the most important part of it. That part is the implementation of antitrust in the offices of corporations, spurred by the advice of their lawyers and the example presented by the misfortunes of their friends—your clients and my clients who have been selected as the objects of antitrust aggression.
>
> Fundamentally, it is not the action taken by the FTC or the Antitrust Division—certainly not the reported cases—but the private corporate decisions that reflect the impact of antitrust. It is these corporate decisions, taken on the basis of fear of prosecution, as well as the less emphatic moral and legal inducements to obey the law, that antitrusters rely upon to contribute to the national well-being. The larger effects of antitrust cannot be found in the law books. They cannot be found in the actions instituted or the actions completed. They can be found in the day-to-day decisions of corporate managers.[22]

And these decisions are of course usually impossible to document.

D. Legal Versus Economic Approach to Antitrust

It was noted at the outset of this report (p. 2), that antitrust law and enforcement has tended towards the preservation of the status quo. There are cogent reasons for this development. It is quite apparent from many court decisions that dissolution of existing firms, even where evidence of monopolistic practices was conclusive, has been rarely required, in large measure because of the belief that adverse effects on employment, investment, and production might be substantial. Some observers also trace a reluctance to prosecute large oligopolistic firms to a reliance upon such firms to finance costly political campaigns.

The attitude towards mergers has been quite different. Here it is a proposed new corporate structure which is being judged. In this case the antitrust agencies and the courts have been far less reluctant to act.

It is also true, as the studies of Long et al., Asch and Siegfried cited above show (pp. 18–20), that the focus of antitrust activity in the Justice Department and the Federal Trade Commission has been geared less to changing the structure of industry to make it more competitive than to act upon complaints by competitors, opting more

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[20] Asch, Peter. Economic Theory and the Antitrust Dilemma, p. 395.

[21] Hofstadter, Richard. What Happened to the Antitrust Movement? In Cheit, Earl F. (editor). The Business Establishment, p. 150. (Italics in original.)

[22] Fortas, Abe. In American Bar Association. Section of Antitrust Law. Proceedings at the Annual Meeting, Chicago, Illinois, August 11–13, 1963, p. 325–326.

often for those cases where the probability of winning a case was greater rather than favoring cases with greater probability of promoting competition in an industry or in the economy more generally.

This again is due at least in part to the fact that our antitrust policies are geared more to challenging certain monopolistic practices that are specifically proscribed by law than to try to decrease monopoly per se by creating a more competitive industry structure.

Put another way, antitrust policies reflect a criminologist's approach to economics. As a recent article observes, antitrust "seeks to punish or deter unwanted behavior; it supplies no model of desired behavior. And as in other lines of police work, the prosecution of misconduct is subject to many personal whims and political interventions." [23]

E. Summary

In summary, the following conclusions appear warranted:

1. Antitrust laws have had a significant effect on certain forms of anti-competitive behavior that have been specifically prohibited under the law. Proposed mergers that clearly increase market concentration beyond acceptable limits and other practices outlawed per se have become much less common. The overall pattern of business practices has been changed from what it would have been in the absence of antitrust law.
2. Although certain outlawed practices have fallen into disuse, there is no solid evidence on the extent to which monopoly and econonmic concentration have been curbed thereby. Monopoly and increased concentration have been achieved in many ways that are not illegal as interpreted by the courts.
3. The extent to which antitrust laws have made our economy more competitive than it otherwise would have been is probably unmeasureable, since their primary impact has been on the nature of decisions reached by corporate boards of directors, in proceedings that remain confidential.
4. There is a lack of consensus both as to how much market concentration and monopoly have been growing and the impact which antitrust law may have had on their growth. Tentatively, it seems reasonable to conclude that antitrust law has had some effect in decreasing the extent of monopoly power, but that the effect has not been very substantial.
5. The extent to which market concentration has grown is probably more a function of economic and technological forces, such as economies of scale, patents, and rivalry in world markets, than of legal restraints.
6. It may be possible to modify government policy in several ways that would be likely to make the national economy more competitive, including (*a*) more effective administration and enforcement of existing antitrust law; (*b*) revision of antitrust law to make it a more effective tool in dealing with monopolistic practices and power that have developed in recent years; and (*c*) modification of other government policies that have an adverse effect on competition. Some of these proposals are discussea in chapter VI.

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[23] Barnes, Peter and Derek Shearer. Beyond Antitrust. New Republic, v. 171, July 6, 1974: 17.

IV. PARTICULAR CURRENT PROBLEM AREAS IN ANTITRUST

It may be well to turn to some current problem areas of antitrust before proceeding to the forms of remedial action referred to in the preceding paragraph. These include the issue of conglomerate mergers, bigness, multinational corporations, political influence of large corporations, and the influence of financial intermediaries.

A. Conglomerate Mergers

The phenomenon of conglomerate mergers has evoked widespread study and controversy in the last two decades.[1] Especially during the 1960's, such mergers grew rapidly, while horizontal mergers declined and vertical mergers showed no definite trend up or down.[2] It seems clear that the Celler-Kefauver Act (discussed above, pp. 10–12) has proved to be reasonably effective in preventing significant anti-competitive horizontal and vertical mergers but was having relatively small effect on conglomerate mergers. As a result, there are major differences of opinion on both the possible threat to competition represented by conglomerate corporations, and the extent to which legislation may be needed to deal with them, if they prove to be in fact serious impediments to competitive enterprise. Some of the reasons for the controversy are not hard to discover.

The first arises from the definition of a conglomerate merger itself—a merger of companies operating in separate and distinct markets. Since the basic thrust of antitrust law is to assure the maintenance of competition in a particular market, the merger of firms which do not compete in the same market can be argued by definition not to result in anticompetitive behavior. And this is in fact what is claimed by many economists.

While arguments for conglomerate mergers may be much the same as for other mergers in terms of greater efficiency and more economical use of resources, particular stress should probably be placed on the superior ability of conglomerate firms to obtain readier and cheaper access to capital funds. This has been well expressed by Oliver Williamson as follows:

> In an economy . . . where returning funds to and reallocating funds by the capital market incurs nontrivial transactions costs . . . the internal reallocation of resources to higher yield uses is what most commends the conglomerate as compared with similarly constituted specialized firms. The conglomerate in these circumstances assumes miniature capital market responsibilities of an energizing kind. . . .

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[1] See especially the special issue of the St. John's Law Review, Conglomerate Mergers and Acquisitions: Opinion and Analysis, v. 44, Spring 1970, 1171 p. Includes a bibliography, pp. 1163–1171.

[2] See especially: Mueller, Willard F. The Celler-Kefauver Act: Sixteen Years of Enforcement. Staff Report to the Antitrust Subcommittee, Committee on the Judiciary. U.S. House of Representatives, 1967, 67 p.; and U.S. Congress. House. Committee on the Judiciary. Subcommittee. No. 5. Investigation of Conglomerate Corporations. A Report by the Staff. 1971, 703 p. (Based on Subcommittee hearings held in 1969 and 1970.)

Once it is conceded . . . that the capital market incurs nontrivial transaction costs in resource allocation and management surveillance respects, there is plainly a case for encouraging, or at least not impeding, organizational innovations which have the potential to attenuate internal organizational distortions. . . . Except, therefore, among giant-sized firms, where the risk of offsetting social and political distortions is seriously posed, a more sympathetic posture by the antitrust enforcement agencies toward conglomerates would seem warranted.[3]

In fact, government policy may have the effect of fostering conglomerate mergers. Section 7 of the Clayton Act itself may serve to encourage a company wishing to expand to look outside its industry for opportunities to grow and invest.

As William Shepherd has noted:

Antitrust fears may lead a dominant firm to forage elsewhere for growth and investment opportunities. Indeed, the tighter the antitrust constraint against increased market shares, the more will excess internal resources (especially profits) accrue and seek outlets.[4]

Tax laws have also facilitated mergers, especially conglomerate mergers. Many mergers of the 1960's took advantage of the corporate income tax deduction accorded interest paid on debt securities such as bonds and convertible debentures, as against the tax liability of dividends paid on common stock, by providing for an exchange of common stock for debt securities. This provision was curtailed, but not entirely eliminated, by the Tax Reform Act of 1969.

High tax rates on dividends may also serve to encourage small family businesses to merge with another company. Once a small business becomes profitable, the combination of corporate income taxes and high individual tax rates may act to encourage mergers, since in a merger the individual gets stock which he can sell and pay taxes at the lower capital gains rates.

In addition, tax-free reorganization may encourage concentration in the following manner:

Since a sale of a business is always a taxable transaction to the sellers and a merger is not, there is an inducement for owners of a closely held corporation to accept a merger offer rather than a purchase offer if the acquiring company's stock is felt to be a good investment. Assuming a capital gains tax rate of 35 percent, a gain on the sale would have to be over one-half again as great as an increase in stock holding through a merger to produce the same after-tax result. This effect, of course, would not be as great, if the tax law did not allow the possibility of avoiding the capital gains tax entirely by holding onto the property and passing it on at death, but with a stepped up basis.

In such a case the tax deferral advantage becomes a tax forgiveness.[5]

The estate tax may also encourage mergers.

In many cases the family business may represent the bulk of the estate and sufficient funds may not be available to pay the estate tax. In addition, a closely held business whose stock is not publicly traded presents substantial difficulties in valuation. Selling a portion of the family business to pay the estate tax may be difficult and even very detrimental for continued operation of the business. The merger of the business to a larger firm presents many advantages in solving these problems. A merger offer qualifying as tax free does not result in taxation, and even with the step up in basis at death may mean that the gain in value will never be taxed under the income tax. A merger which results in the holding of a

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[3] Williamson, Oliver. Markets and Hierarchies: Analysis and Antitrust Implications. New York, Free Press, 1975, p. 259-260.

[4] Shepherd, William. Market Power and Economic Welfare, p. 43.

[5] Gravelle, Jane G. Tax Provisions Affecting Business Concentration. In: U.S. Committee on Government Operations. Subcommittee on Budgeting, Management, and Expenditures and Subcommittee on Intergovernmental Relations. Corporate Disclosure. Hearings . . . April 23-May 21, 1974, Part 2, p. 623-624.

publicly traded stock helps to deal with both the valuation problem and estate tax problem which require a partial liquidation of assets.[6]

Nevertheless, there are several grounds on which conglomerate mergers can be, and have been, challenged. Some of the practices which have led to the prosecution of conglomerates include the following violations of antitrust law: (1) predatory pricing tactics against firms in a single product or geographical market; such tactics often involve cross-subsidization, by which a firm uses profits obtained in one industry to subsidize sales at a loss or at a below normal rate of profit in another industry; (2) agreements for reciprocal purchasing of customers' products; and (3) explicit or tacit agreement to limit competitive activity in a rival sphere of influence. Such an agreement to limit competitive activity may result when management of a conglomerate considers that a competitive attack upon a rival conglomerate is likely to result in retaliation in an industry vital to it. Thus it will be likely to abstain from such an attack; and the larger the number of industries in which conglomerates face one another, the stronger the probability of mutual forebearance. Cases have also been brought against conglomerates where they have been shown to cause a reduction in *potential* competition, and where the reduction in the number of independent companies has lessened the incentives and capability of competitive innovation.

There is disagreement as to the extent to which conglomerate enterprises engage in allegedly anticompetitive practices, such as those referred to above, and further, when they do, whether such practices are due to the fact of being a conglomerate, or rather the fact that the firm has reached a size that gives it the power to engage in such practices. The issue is further clouded by the fact that almost all of the largest corporations are to some degree conglomerate enterprises whose operations are highly diversified both in terms of product and in terms of physical location.

Walter Adams stressed the dangers of conglomerate mergers as follows:

> Conglomerate power does make a difference. It derives not from monopoly or oligopoly control of a particular market, but from diversification over a whole range of markets. It enables a firm, endowed with absolute size and the deep purse, to "outbid, outspend, and outlose" its smaller rivals, and thus to insure its survival almost irrespective of its performance. Finally, as recent events have demonstrated, it conveys a unique access to political power and the opportunity to transform the state into an instrument of privilege creation and protection.[7]

Similarly, Corwin Edwards notes:

> When in some part of its business [a large diversified enterprise] competes with enterprises that are substantially smaller and less diversified, its power to coerce and intimidate them is like, but usually greater than, the power that it can obtain from differential size alone. . . . If it chooses to compete with special vigor in one field, the specialists that it injures there are unlikely to be able to invoke antitrust protection. Antitrust does not require that diversified enterprises make profits of similar proportions in each line of activity, and cannot easily distinguish funds transferred from one product to another in order to intimidate or injure competitors from funds similarly transferred for other purposes.[8]

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[6] Ibid., p. 630.

[7] Adams, Walter. Corporate Power and Economic Apologetics: A Public Policy Perspective. In: Industrial Concentration: the New Learning, p. 368.

[8] Edwards, Corwin D. Economic Concepts and Antitrust Litigation: Evolving Complexities. Antitrust Bulletin, v. 19, Summer 1974: 316–317.

William James Adams of the University of Michigan goes further in arguing that failure of the antitrust enforcement agencies to prosecute conglomerate mergers is based on two faulty premises:

(1) That horizontal dominance somewhere is required for a firm or group of firms to explain any monopoly power latent in the existing industrial environment,

and

(2) That horizontal dominance somewhere is required for a firm or group of firms to alter the industrial environment in such fashion as to increase the amount of monopoly power latent therein.[9]

These premises, he argues, keep courts and regulatory agencies mired in "the quagmire of artificial market delineation." [10] William Adams maintains that on the contrary two other hypotheses are more realistic and would provide a sound rationale for legislation attacking the conglomerate problem more directly, namely:

(1) Where firms operate in multiple markets, the likelihood of collision and the height of barriers to new competition depend on some factors simply not detectable by individual market analysis;

and

(2) where firms enjoy large total scale, they are likely to benefit from preferential access to power investment funds and cheaper costs for power investment projects, facilitating transformation of the existing industrial structure into one increasing the extent of corporate power.[11]

On the other hand, Jesse Markham in his 1973 study, "Conglomerate Enterprise and Public Policy," concludes:

There is little if any evidence that diversified companies, simply because of their diversification, present special problems beyond the reach of our antitrust policy as presently administered.

As companies reach a threshold of diversification, such matters as pricing and related market activities increasingly are made a matter of divisional autonomy. This means that in day-to-day operations divisions of conglomerates function very much the same as undiversified companies. Moreover, the evidence is fairly persuasive that highly diversified companies are certainly no more, and may even be less, given to the practice of reciprocity than large corporations generally . . . .

We are led then to the conclusion that highly diversified firms (or, if one prefers, conglomerates) present no special antitrust problems, and require no special antitrust policy. The decade of the 1960's witnessed the spectacular rise of about 25 new conglomerates, and a significant increase in overall company diversification. But in the marketplace they appear to behave no differently from other firms. Accordingly, our present policy would appear to lose none of its effectiveness if directed toward preventing and dismantling intolerable market power without special regard to the product diversity of its corporate residence.[12]

Essentially similar is the conclusion of Oliver Williamson:

One concludes that while antitrust vigilance with respect to reciprocity and cross-subsidization is warranted, conglomerate acquisitions ought not to be regarded with special animus on either account . . . . Public policy will be served by identifying specific instances where conglomerates pose problems rather than mounting a broadscale attack. Specific abuses (for example, reciprocity) ought to be challenged but conglomerate acquisitions ought not to be arrested on this account. Similarly, potential competition cases ought to be brought only where nontrivial entry barriers exist and the acquiring firm can be characterized as a most likely potential entrant.[13]

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[9] Adams, William James. Market Structure and Corporate Power: The Horizontal Dominance Hypotheses Reconsidered. Columbia Law Review, v. 74, November 1974: 1280.
[10] Ibid., p. 1292.
[11] Ibid., p. 1281.
[12] Markham, Jesse W. Conglomerate Enterprise and Public Policy. Boston, Harvard University Graduate School of Business Administration, 1973, p. 175–176, 177.
[13] Williamson, op. cit., p. 165, 170.

But the concern voiced by Walter Adams and others about conglomerate enterprises in general and conglomerate mergers in particular has been accentuated in recent years by the growth of large multinational corporations which have achieved size and economic strength of such magnitude as to present a challenge to national sovereignty. By their ability to shift assets, personnel, and operations from one country to another, multinational enterprises have become more difficult to monitor and regulate than businesses without extensive international undertakings. Most of the multinationals probably meet the test of being a conglomerate, not only by operating in separate national markets, but by being engaged in different product markets as well. (See p. 29–30 below.)

The wave of conglomerate mergers of the 1960's has receded for several reasons. Their advantages were oversold in the era of speculative euphoria. Expected economies of scale in obtaining capital and in management control often failed to materialize. Inexperience in new fields of enterprise took its toll. The stock market decline in 1969 discouraged expansion of business ventures. The Tax Reform Act of 1969 also eliminated some of the tax incentive for mergers.

Nonetheless, many issues involving conglomerate corporations and their economic power remain. What proper policy should be continues to be in dispute. One school of thought argues that the Celler-Kefauver Act contains sufficient authority to cope effectively with anticompetitive conglomerate mergers. Others contend that new and stronger legislation is needed. The resolution of these opposing views may well depend on whether the Supreme Court decides that the Celler-Kefauver Act is in fact sufficient to strike down significant conglomerate mergers, where horizontal and/or vertical merger elements are either absent or too insignificant to form the rationale for a court decision for or against the conglomerate merger.

B. The Problem of Bigness

Since the major conglomerate businesses that raise concern for antitrust prosecutors and other students of corporate power are those of large aggregate size, and in many cases multinational in operations, the issue arises whether the main source of this concern is the size of the company, its conglomerate corporate structure, or where applicable, its multinational operations.

Bigness in business understandably evokes ambivalent reactions. As has been reiterated repeatedly, in the law size per se is not a violation of antitrust law. Where increasing size brings about economies of scale, such increases have merit. However, there are anticompetitive practices which businesses are able to put into effect by virtue of size, that would seem to make them appropriate targets for antitrust action. Thus, frequently associated with bigness are such practices as coercion and intimidation, preclusive purchases and ownership of facilities and resources, and exclusive dealing and tying arrangements.

As Walter Adams noted,[14] a firm substantially larger than its rivals can out-spend, out-dare, and out-lose them. Further since a large

[14] See p. 25 above.

business usually carries out a broader range of business functions than a small one, it is in a better position to take steps that can have a disastrous effect on a small single-line business, without any adverse results on many parts of its own. As Corwin D. Edwards has recently noted:

If we disregard such protection as may be provided by the antitrust laws, a big enterprise has power to injure, cripple, or destroy one substantially smaller without fear of significant retaliation; and it can derive from this power, without needing to exert it, power to intimidate and coerce such competitors. [15]

Corwin Edwards goes on to note that while antitrust laws have significantly reduced the ability of large firms to apply such pressure, there are still many forms of pressure which are hard to distinguish from ordinary competitive behavior. Further, available legal procedures are often slow and uncertain. As a result, Edwards concludes:

Unwilling to take the risks involved, small firms are likely to avoid decisions that are conspicuously independent if these might make the large competitor regard them as nuisances. Thus, the behavior of the small is warped toward conformity to the conduct of the large and toward acceptance of leadership by the large.

Whatever the source of the docility, differential size tends, through fear of coercion, to reduce the initiative and independence of small competitors and the vigor of competition.[16]

In view of the prevailing legal view that corporate size per se provides no basis for antitrust prosecution, it is understandable that the focus of remedial action has been on conglomerates, even if there is evidence that size itself may prove to be a major reason for a company's dominance and monopoly power.

As the above discussion illustrates, it proves difficult to determine whether particular anticompetitive practices are a result of a firm's size, of the conglomerate nature of its operation, or because of the combination of size and diversification. This dilemma is naturally enhanced in practice by the fact that most of the largest concerns that might be in a position to throttle competition are also conglomerate in the range of their operations.

This dilemma is well illustrated by a consideration of recent proposals designed to restrict conglomerate mergers. The White House Task Force on Antitrust Policy (sometimes called the Neal Committee after its chairman, Phil C. Neal) recommended in 1968 that large firms be prohibited from acquiring leading firms in major concentrated industries.[17]

The Campbell-Shepherd proposal [18] in 1968 would consider leading-firm conglomerate mergers presumptively unlawful under Section 7 of the Clayton Act. Such mergers would be those in which the acquiring and the acquired firm are each any of the three to six largest firms in at least one concentrated industry (one in which four-firm concentration is above 40 percent) which is large enough to be significant (an industry with assets of over $100 million).

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[15] Edwards, Corwin D. Economic Concepts and Antitrust Litigation: Evolving Complexities. Antitrust Bulletin, v. 19, Summer 1974: 314.

[16] Ibid., p. 314–316.

[17] U.S. White House Task Force on Antitrust Policy. Report, May 21, 1969, 28 p. Further consideration, of the Neal Committee report is to be found on pp. 38–39.

[18] Campbell, James S. and William G. Shepherd. Leading-firm Conglomerate Mergers. Antitrust Bulletin v. 13, Winter 1968: 1361–1382.

The Department of Justice guidelines of 1968 would subject to challenge conglomerate mergers that reduce potential competition or breed reciprocity. Firms would be permitted to gain a toehold in another industry but would not be permitted to achieve a dominant position in that industry.[19]

In each of these proposals purportedly intended to control conglomerate mergers, it is the factor of size combined with a substantial degree of monopoly or oligopoly power which is a dominant consideration.

C. Multinational Corporations

Multinational corporations have been referred to above (p. 27) as a special case of conglomerate companies. But they have enough special characteristics and have become such prominent elements in the nation's economy as to warrant attention in their own right.

Although by no means a new phenomenon—they go back at least to the East India Company in the 16th century—multinational corporations have become an increasingly significant part of the American economy in the past half century, especially since World War II. Their international operations can give them elements of economic power that are not available to their purely domestic rivals. They are more readily able to shift resources and skills to take advantage of changes in product costs and market opportunities on a worldwide scale. They can often derive appreciable income from currency transactions in times of monetary upheaval. Their competitive advantage has often been enhanced by Federal assistance of various kinds, such as research and development subsidies and tax concessions. Spokesmen for these companies have argued, often persuasively, that such concessions are in the national interest through their enhancement of American trade and influence around the globe.

On the other hand, it must be recognized that multinational corporations face risks of expropriation and foreign government regulation and restriction (including their antitrust laws). Also American overseas operations are still subject to U.S. antitrust laws where they affect U.S. commerce in prohibited ways.

Thus a dilemma exists as to how antitrust policy ought to be modified as it applies to multinational companies. Whatever restrictions might be placed on their operations to limit their competitive advantage over domestic rivals need to be weighed against adverse effects that such restrictions might have on the ability of these same multinational firms to compete abroad against foreign enterprises.

At present, legislative curbs upon multinational corporations appear to be directed primarily toward greater disclosure. For example, following extensive hearings by a subcommittee of the Senate Foreign Relations Committee, Senator Church introduced S. 3151, 94th Congress, the Multinational Business Enterprise Information Act of 1976. This bill would require on a country-by-country basis information on all foreign affiliates and branches of American firms relating to, among other items, their assets, income, commodities produced, direct investments in them, financial transactions among them, taxes paid, imports and exports, employment data and research and de-

[19] Mitchell, John. Address before Georgia Bar Association, June 6, 1969.

velopment expenditures. Data relating to products are to be reported whenever possible on a product line basis. In addition, each reporting firm would be required to provide the amount of expenditures in the United States and in foreign countries directly or indirectly to any agent or pursuant to any contractual arrangement.

If legislation along the lines of this bill were to be enacted, one would have a reasonable chance to ascertain whether the market power of multinational corporations is due in preponderant measure to operations of their foreign subsidiaries or affiliates and, if so, if that market power were injurious to an appreciable degree to competition from domestic firms.

The outlook for legislation beyond these disclosure requirements is uncertain at best. This is due in part to legal and enforcement difficulties in policing international operations of the multinational firms, and in part to the role they play in American international economic policy, a role which their spokesmen, of course, emphasize with unabating fervor.

D. Political Influence of Large Corporations

The influence on government of major corporations, although not necessarily greater than that of other interest groups, is no doubt substantial. However, it is difficult to measure. This influence is more likely to be directed at specific targets for governmental action, or in opposition to such action, than to take the form of broad attempts to dominate government decision making. It is easy to recognize that much of the influence which a large company will attempt to bring to bear upon government will have important consequences for competition. Large companies lobby for measures that will be relatively more beneficial to them than to potential or actual competitors. Tax, tariff, subsidy, and other legislative and regulatory proposals get hammered out with major inputs by companies that wish to retain or increase their relative competitive advantage. Nor is such an expression of views undesirable. On the contrary, attempts to limit such views would be unconstitutional and futile as well.

The means by which corporations influence public policy is far from adequately understood. While some studies such as "The Politics of Oil" by Robert Engler and "American Business and Public Policy" by Raymond Bauer, Ithiel de Sola Pool, and Lewis Dexter on the role of corporations in affecting tariff policies in the 1950's, provide useful insights, much more needs to be known. This is admittedly difficult, given the penchant of businesses to shield the nature and extent of their political activities. But it is essential if our insights into corporate political power are to be accurate and meaningful.

In terms of regulation of corporate political activity, a distinction is important between generally acceptable activity, such as open testimony before Congressional committees, government service by corporation employees with needed expertise, and much trade association activity, and generally unacceptable activity, such as bribery, undercover payments, and coercion of legislators and other government officials.

While it may prove difficult to devise a model code of corporate political conduct, disclosure of political activity would appear to be an essential criterion.

E. Power Exerted by Financial Intermediaries

One element of potentially significant monopoly power which has received relatively little attention to date and which is not subject to effective regulation is the control or influence exerted by a bank or other financial institution over two or more firms competing in a single industry. Banks, and to some extent other financial institutions, can exert influence over a firm through voting shares of common stock over which they have direct or indirect authority, through representation on the board of directors of the firm, and through extensions of lines of credit and other loans. Where more than one of these channels of influence exist, they may be presumed to reinforce one another.

Where, for example, a bank holds stock in two directly competing firms, management of one firm might be deterred from making decisions and implementing policies that would have an adverse effect on the other firm. The extent of this kind of influence needs extensive research and investigation. The rapid rise of institutional holdings, including pension funds with large common stock portfolios, membership by officials of banking and other financial institutions on the boards of competing major industrial companies, and the continuing massive capital requirements of giant corporations suggest that such influence may be substantial. Such influence could be expected to be exerted not infrequently in favor of policies that tend to thwart rather than to encourage competition.

One proposal to deal partially with this problem, made by Dr. John Blair, is to prohibit any financial institution (or its nominees) from voting the stock (either directly, by proxy, or otherwise) which it holds (for itself or for others) in two or more competing firms.[20] Another might be to place some further restrictions on the practice of interlocking directorates. Under Section 8 of the Clayton Act direct interlocks between competitors above a given size are prohibited. This does not, however, prevent an indirect interlock by which, for example, a bank may be represented on the boards of two competing airlines, and thereby have the opportunity to influence policy in the direction of curbing that competition. It may therefore be advisable to consider legislation which would place certain limits on this kind of interlocking director relationship.

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[20] Blair, John M.: Economic Concentration: Structure, Behavior and Public Policy. New York, Harcourt Brace Jovanovich, 1972, p. 575.

V. DEFICIENCIES OF DATA AND ANALYSIS

Before turning more systematically to some of the alternatives that have been proposed for dealing more effectively with inequities resulting from monopoly, oligopoly, and excessive market power, it is important to be aware that much of the variation in focus and in emphasis depends upon evaluation and interpretation of existing information, information that is almost universally recognized as deficient in many ways.

Of course for policy makers it is a commonplace to bemoan the lack of or the inadequacy of data on which to base decisions and to outline courses of action. This is transparently the case in antitrust law and policy. Not only are significant data often lacking or inadequate; there is also substantial controversy as to the significance of such findings as are agreed upon.

Disagreement as to whether or not market concentration has increased during the past eighty years, or during segments of that period, has already been mentioned above (pp. 17 and 20). Such disagreement has in fact spawned a considerable literature.[1] At the core of this disagreement are problems of measuring market concentration and evaluation of what the significance of such market concentration is for competition and for productivity.

Accurate measurement of market concentration requires conceptually meaningful data for industries, markets and firms. It is difficult to reach agreement on an acceptable definition of an industry or market in a dynamic world of multiproduct firms, whose product mix is in a frequent state of flux, with scattered geographical operations and locations of actual and potential customers.

Census industries often do not correspond to economically meaningful markets (especially regional and local markets). Further, comparison of firms within an industry is difficult because they typically do not structure their internal operations and financial reporting in the same manner or in any manner consistent with providing clear answers to relevant questions of market power.

Concentration measures are thus relatively crude. Improvement will require better, more consistent, and more meaningful reporting of financial and operating data by firms. But even significantly improved data on which to determine market concentration will leave a host of questions for policy makers.

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[1] See, for example:
Adelman, Morris. The Measurement of Industrial Concentration. Review of Economics and Statistics, v. 33, November 1951: 296–196.
Berle, Adolf and Gardiner Means. The Modern Corporation and Private Property. New York, Macmillan, 1932.
Nelson, R. L. Concentration in Manufacturing Industries in the United States. New Haven, Yale University Press, 1963.
Shepherd, W. G. Trends of Concentration in American Manufacturing Industries. Review of Economics and Statistics, v. 46, May 1964: 200–212.
U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Antitrust and Monopoly. Economic Concentration. Hearings . . ., parts 1-7. Washington, U.S. Govt. Print. Off., 1964–68.

The determinants of market power, such as economies of scale, of capital raising, and of procurement, need to be better understood. We lack good time series data showing the degree of correlation between market concentration and industry profitability, even if much evidence suggests the correlation to be positive. We understand very imperfectly the mechanism by which market concentration affects firm behavior. To what extent do large corporations participate in arrangements that limit their freedom of action or the freedom of action of those they deal with? To what extent do smaller or weaker firms, or potential rivals, in an oligopolistic industry find their freedom of decision making impaired by the presence of one or more dominant firms in the industry? What is the relationship between concentration and barriers to entry? Where entry is easy, concentration measures may have little relationship to market power. Does competition result in higher or lower costs per unit of output? How does this vary by industry?

Do highly concentrated industries contribute more or less than more competitive industries to inflation? [2]

There are serious gaps in cost, price, and profit data by product lines; such information is needed to determine how closely multiproduct firms follow or diverge from competitive market behavior. We have little information as to whether or not firms in concentrated industries are able to exert greater political leverage than those in more competitive industries. We need a better understanding of the corporate decision making process and how it affects the power of large firms in concentrated industries. We need to know the extent of influence of financial institutions on market behavior, as exerted through credit policies, interlocking directorates, and right to vote common stock.

A familiar defense of firms with a high degree of market power is that such power is essential to achieve economies of scale, to raise capital efficiently, to provide technological leadership, and to compete on world markets. But counter-arguments are also presented. Some argue, for example, that monopoly breeds inefficiency, leads to disregard of costs, and lethargy in adopting technological improvements. There is in fact a dearth of information on which to assess the validity of these rival claims.

We have little accurate information on economies of scale, how they are related to size of market and to the technology of an industry, how they may differ between a new industry and a technologically mature industry.

We lack a clear knowledge as to the correlation between market power of a firm and its contribution to technological and scientific progress. That the largest firms are not always the leaders in technology has been demonstrated to be the case in several industries.

Even if a certain degree of oligopoly power is demonstrated to be essential for optimum efficiency, it still needs to be discovered what the level would be. And, if in a given industry the pace of innovation and technological change continues to rise after moderate levels of concentration are reached, it needs to be determined whether the

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[2] See: Blake, Harlan M. Legislative Proposals for Industrial Deconcentration. In: Industrial Concentration: The New Learning, p. 351–354.

benefits associated therewith are sufficient to offset the adverse monopoly effect of high concentration. In more general terms, how does one find the balance between, on the one hand, possible benefits of economies of scale and more rapid technological change and, on the other, the harmful effects of collusive behavior in concentrated markets? The question can also be put somewhat differently: to what extent is monopoly power derived from superior efficiency due to economies of scale and to what extent does it stem from the ability of monopolistic firms to collude successfully because of their "fewness"? [3]

The difficulties in providing answers to these and related questions help explain much of the uncertainty and controversy surrounding the possible impact of antitrust laws and enforcement, as discussed above in Chapter III.

Both in the antitrust field and in other areas, there has been little attempt to make an assessment of the impact of governmental decisions and policies. The effectiveness of actions taken by the courts providing for divestiture, dissolution, and changes in business practices is essentially a *terra incognita*. We do not know which remedies have been effective and which have not. Most remedies have received little analytical evaluation, either by the courts or by scholars.

Finally, it is essential to be able to make more accurate assessments as to the impact of governmental actions, beyond antitrust, on monopoly and competition. The present surge of activity in attempts to restrict the authority of many of the independent regulatory agencies reflects a growing conviction that to a substantial degree the policies and practices of these agencies have served to shield the firms and industries they regulate from competition and that they are thereby promoting monopoly. The extent to which this occurs clearly varies from agency to agency and is likely to shift over time. In fact the degree to which a given agency is fostering monopoly is largely speculative. As has already been noted (pp. 3–4) there are many other government programs and practices that encourage monopoly and discourage competitive enterprise. Here again there has been little attempt to measure the full impact of these actions.

It might easily be inferred that this dearth of information and relevant analysis needed for sound public policy might well justify a complete paralysis in the antitrust field. But as a policy option this has as many, if not more, risks than taking specific steps to reform antitrust or other measures to bolster competition, even if the full impact of such actions is thus far unmeasurable. A policy of inaction remains an invitation to those who benefit from monopolistic power to strengthen their hold on the market and to make it more difficult for a more truly competitive market to function. And in spite of deficiencies, progress has been and continues to be made in data gathering and analysis that provide a basis for developing realistic modifications of existing antitrust law and administration.

It is to some of these policy alternatives that the next chapter is devoted.

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[3] See: Edwards, Franklin R. Concentration, Monopoly, and Industrial Performance: One Man's Assessment. In: Industrial Concentration: The New Learning, p. 428–430.

VI. PROPOSED REFORMS IN GOVERNMENT ANTIMONOPOLY POLICY

The previous chapters have outlined basic elements in Federal government policy with respect to monopoly and anti-competitive business practices and have indicated to some extent how successful such policy has been, in what areas, and where deficiencies remain. In the course of that discussion, there have been references to possible remedies and other modifications in policy. In this chapter different alternative means of coping with monopolistic and related practices will be pointed out more systematically.

These approaches to monopoly and excessive market power may be grouped into three general categories, which are not, of course, mutually exclusive:

(1) Increasing the effectiveness of present antitrust law by increasing resources devoted to antitrust, increasing administrative efficiency, increasing penalties, and taking other essentially procedural steps.

(2) Amending the substance of antitrust law so that it can serve as a more effective tool for dealing with the problems associated with monopoly and excessive market power.

(3) Taking steps to remove governmental barriers to competition and to provide direct incentives for a more competitive market system.

A. Strengthening of Existing Antitrust Law

One approach to enhancing the effectiveness of antitrust law is based on the premise that existing antitrust law is fundamentally adequate in terms of its substantive provisions, that what is needed is improved procedures and more effective enforcement.

Typical of this approach is the Antitrust Improvements Act of 1976, Public Law 94–435, approved September 30, 1976. The Act is probably the most significant antitrust legislation passed in the 94th Congress and is the end result of prolonged debate and extensive compromises in both Houses of Congress.

The law contains three principal provisions:

(1) Expanding the authority of the Antitrust Division of the Department of Justice to issue civil investigative demands on both businesses and individuals in order to obtain evidence on possible antitrust violations in advance of the filing of an antitrust complaint. The Federal Trade Commission and most other Federal regulatory agencies already possess this authority.

(2) Requiring that the Antitrust Division be given 30 days advance notice of corporate mergers involving firms with assets of over $100 million merging with other firms with assets or sales of $10 million or more.

(3) Giving the Attorneys General of the fifty States the power to bring triple damage suits, on behalf of all the residents of their States who suffer damages flowing from violations of the Sherman Act. This is the so-called *parens patriae* provision.

Increasing fines for antitrust violations is a perennial recommendation. As a matter of fact the Antitrust Procedures and Penalties Act (Public Law 93-528, approved December 21, 1974) did increase the maximum fine for antitrust violations from $50,000 to $1,000,000 for corporations and to $100,000 for individuals, and raised the maximum criminal penalty from one to three years in prison. (It also provided for procedures to expedite antitrust cases of general public importance and strengthened the powers of the Federal Trade Commission relating to enforcement of subpoenas and temporary injunctions.)

Perhaps more important than raising the level of fines is to attempt to provide that fines be better adjusted both to the degree of harm done by the violation of law and by the firm's ability to pay. At present it would seem that while fines are relatively high for some offenses by small firms, they are low enough to be a minor deterrent for very large firms. It may also be noted that if enforcement were more thorough and therefore the probability of prosecution greater, the fines could well be lower than they need to be where the likelihood of conviction is less.

For decades it has been argued that appropriations for antitrust enforcement are inadequate in view of the substantial resources which major corporations are able to spend in defense against government prosecution. The limited funds available to the Antitrust Division and the Federal Trade Commission have been a factor in forcing the government to be highly selective in deciding which prosecutions or investigations to undertake, and have often led to a reluctance to oppose companies where successful prosecution is in doubt because of the preponderant legal resources which can be expected to be brought to bear in their defense.

S. 1136, 94th Congress, introduced by Senator Hart and Senator Scott on March 11, 1975, is typical of bills introduced in the Congress to raise antitrust appropriations. It would more than double the amounts available for antitrust enforcement activities for a period of three years.

Large appropriations are not in themselves a guarantee that antitrust agencies will be effective, however. As mentioned above (pp. 18-20), politics and expertise of personnel can be major factors in the impact that antitrust will have. The subordination of skills in economics, finance, engineering, and accounting to legal talent in the antitrust agencies has cost them in expertise to an extent that has probably diminished their effectiveness against their adversaries in court. If lawyers in these agencies were better supported by experts in other fields, such as finance and economics, the choice of cases and the nature of evidence to be presented could make antitrust a more effective force in the economy. In the selection of cases, more weight should probably be given to the economic benefits expected to be derived, and less on the probabilities of winning. Reorganization, better trained personnel, longer tenure, better planning, all could help in cutting down on waste and inefficiency.

There are inescapably political factors that motivate the amount of energy and the direction of antitrust efforts. While these can probably never be completely eliminated, and perhaps should not be, efforts to depoliticize antitrust enforcement merit consideration. How to deal appropriately with pressures on government exercised by powerful corporations remains a serious problem as recent events amply demonstrate. As noted above, p. 30, attempts might well be made to devise more specific codes of conduct which would define unacceptable kinds of activity—such as intimidation of legislators and other government officials, undercover payments and other forms of bribery—and acceptable forms of conduct, such as providing information and expertise to assist legislators and administrators. It may be desirable to reexamine existing legislation on the legality of corporate political contributions to make it more readily enforceable and effective. The recently reported briberies and influence payments by major corporations linked to foreign governments as well as to domestic political parties make this a matter of immediate concern.

B. Limitation of Market Power

It is widely agreed that the antitrust law of the land has not exerted an appreciable effect on the extent of concentration in the American economy, that in fact during much of the period since 1890, concentration has apparently been rising rather than falling. (Admittedly, as noted above (pp. 17, 32–34), the data on concentration and their significance are subject to continuing controversy and disagreement among economists and others.) This lack of effectiveness prevails in spite of the success the government has had since 1960 in blocking many mergers which would have increased concentration. This success is in perhaps ironic contrast to attempts to undo past mergers which may be fully as harmful to competition as planned mergers which would increase concentration. This contrast, as noted above (pp. 12–13), is due at least in part to the reluctance of courts to tamper with existing corporate entities where dissolution or divestiture are feared to have adverse effects on efficiency and on the income of investors.

It may also be due to the fact that acceptable structural remedies have been difficult to find. As Peter Asch has noted:

> If existing physical structures are easy to duplicate (e.g. American Tobacco), then market power rests on other things than size and there may be no point in splitting up a firm. If, on the other hand, structures are hard to duplicate, firms are likely to be hard to split up. In the latter instances the government often has been unable to produce clearly workable remedies that would yield the desired reduction in power without harming efficiency. When such difficulties are combined with the typical reluctance of the courts to tamper with existing concerns, the lack of meaningful structural remedies is understandable.[1]

The dichotomy between merger policy and policy apropos existing firms with monopolistic power has led to several proposals that would face up to the problem of market power head on. These proposals are based on the premise that this differential treatment is unjust and brings into question the credibility of antitrust law generally. They are also based on the belief that market structure in

[1] Asch, Peter. Economic Theory and the Antitrust Dilemma, p. 399.

itself can lead to undesirable effects on the economy. As Phil Neal noted, such proposals are based on the theory "that markets with concentration will tend to behave in certain ways because of their structure, even though the undesirable behavior cannot be readily identified or its consequences clearly measured." [2]

Three of these proposals will be noted as being among the more prominent or significant—the Kaysen-Turner draft statute, the Neal Committee proposal, and Senator Phil Hart's Industrial Reorganization bill. A few other proposals will be referred to more briefly.

1. *The Kaysen-Turner Draft Statute*

In 1959 Carl Kaysen and Donald F. Turner in their monograph, "Antitrust Policy, an Economic and Legal Analysis" included a draft statute providing standards for reasonable market power and means of achieving divestiture where market power was unreasonable.[3] They suggest as evidence of market power: (1) persistent failure of prices to reflect substantial declines of demand or costs, or to reflect substantial excess capacity; (2) persistence of profits that are abnormally high, taking into account such factors as risks and excess capacity; or (3) failure of new rivals to enter the market during prolonged periods of abnormally high profits or of persistent or recurring rationing.[4] Such unreasonable market power "shall be conclusively presumed where, for five years or more, one company has accounted for 50 percent or more of annual sales in the market, or four or fewer companies have accounted for 80 percent of sales." [5]

This market power shall be deemed to be unreasonable unless based upon such economies as are dependent upon size in relation to the market, ownership of valid patents, or lower prices or superior products attributable to the introduction of new processes or improvements or to extraordinary efficiency of a firm in comparison with that of other firms having a substantial share of the market.

The draft statute provides for an executive agency—the Industrial Reorganization Commission—and a judicial agency—the Economic Court—to prepare remedies for unreasonable market power. The usual remedy would be structural reorganization of one or more firms, and the creation of new independent companies.[6]

2. *The Neal Committee Proposal*

The 1968 report of the White House Task Force on Antitrust Policy (commonly called the Neal Committee) called for proceedings aimed at restructuring oligopolistic industries. Oligopolistic industries are defined as industries with (a) more than $500 million in annual sales in 4 of the last 5 years; (b) four-firm concentration of 70 percent or more in 4 of the most recent 6 years; and (c) the *same* four firms retaining leading market positions over the last five years.[7] The goal

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[2] Neal, Phil Caldwell. On Implementing a Policy of Deconcentration. In: Industrial Concentration: The New Learning, p. 379.
[3] Kaysen, Carl and Donald F. Turner. Antitrust Policy: An Economic and Legal Analysis, p. 266–272.
[4] Ibid., p. 266.
[5] Ibid., p. 267.
[6] Ibid., p. 268–269.
[7] White House Task Force Report on Antitrust Policy. Report, July 5, 1968, released May 21, 1969, p. 13.

of restructuring, under court order, would be a maximum market share of 12 percent for any firm and 50 percent for the top 4 firms. Provisions for voluntary restructuring by firms involved and for the justification of higher levels of concentration on the basis of scale economies were included.

3. *Senator Hart's Industrial Reorganization Bill*

The most prominent of current proposals to attack excessive market power is Senator Hart's bill, the Industrial Reorganization Act, originally introduced in the 92nd Congress on July 24, 1972, and most recently as S. 1959 in the 94th Congress on June 17, 1975. (The discussion herein is based on the 1975 bill.) It is comprehensive, not only in enlarging the legal basis on which monopoly may be effectively countered, but also in the administrative and judicial agencies which it would establish to implement the Act.

In terms of its focus, two provisions are especially significant: (1) its broadened concept of monopoly; and (2) its specific targets of seven major industries to be studied and investigated to determine the extent of monopoly power they exercise and to formulate reorganization plans to curtail such power.

In introducing the 1975 bill, Senator Hart stressed the non-punitive character of his bill. As in the Kaysen-Turner and the Neal Commission proposal, restructuring of an industry is the primary means relied upon to achieve the objective of making a monopolistic industry more competitive. In Senator Hart's words: "The companies are not being 'punished' by the restructuring which might occur. No matter how the monopoly power was acquired, under this bill, there are no criminal penalties applied. The only result of the bill's enforcement would be restructuring—no jail terms or $1 million fines. More importantly, no treble damage liability attaches." [8]

Title I of the Act provides two basic criteria for determining the existence of monopoly power. It declares that there is a rebuttable presumption that such power exists if (1) there has been no substantial price competition among two or more corporations over a period of three consecutive years out of the most recent five, or (2) if four or fewer corporations account for 50 percent or more of sales in any line of commerce in any section of the country in any year out of the most recent three.

A corporation shall not be required to divest itself of monopoly power if it can show that such power is due solely to the ownership of valid patents, or that such a divestiture would result in a loss of substantial economies.

The proviso for the study and investigation of seven major industries is indicated in Title II of the Act establishing, for a period of 15 years, an Industrial Reorganization Commission. These industries are (1) chemicals and drugs, (2) electrical machinery and equipment, (3) electronic computing and communication equipment, (4) energy, (5) iron and steel, (6) motor vehicles, and (7) nonferrous metals. For each of these seven industries the Commission is to determine (1) the maximum feasible number of competitors at every level without the

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[8] Congressional Record (daily edition), June 17, 1975: S 10732.

loss of substantial economies; (2) the minimum feasible degree of vertical integration without the loss of substantial economies; and (3) the maximum feasible degree of ease of entry at each level. The Commission is also directed to study the collective bargaining practices within each of these industries and determine the effect of such practices on competition. It is to prosecute violations of monopolistic practices, as determined by Title I of the Act, by filing complaints and proposing orders of reorganization with an Industrial Reorganization Court, established under Title III of the Act.

The Industrial Reorganization Court would have the responsibility to issue orders of reorganization to accomplish the purposes of the Act, i.e., to restore effective competition. Such orders may include requirements that a corporation modify contracts, terminate agreements with other corporations, modify its methods of distribution, require the granting of licenses under patents owned by the corporation or of technical information, and divestiture of particular assets. The last of these is the one alluded to most specifically as probably essential to fulfill the purposes of the Act.

To provide firmer empirical evidence on which to base its findings, the Commission would have the authority to obtain detailed financial and operating data from companies it investigates, including profit and loss and other cost and income data for any product or line of commerce.[9]

The stress on disclosure in the Hart bill is based on the two premises that (1) the information required is essential to the Commission's developing a plan of reorganization for each industry, and (2) that public disclosure of what has heretofore been largely kept secret of large corporate operations would itself abet competition and deter monopoly.

A basic aspect of the bill is its premise that a finding of monopoly power is not predicated on a finding of specific anticompetitive actions, such as collusion, combination, or conspiracy, but is on establishment of specific standards and exceptions for finding monopoly power, applicable throughout the economy. The Act, for example, declares that it is "unlawful for any corporation, or two or more corporations, *whether by agreement or not,* to possess monopoly power in any line of commerce in any section of the country." (Title I, Sec. 101(a).) (Italics added.) By including the italicized phrase, it is not necessary to prove "contract, combination, or conspiracy" as required under section 1 of the Sherman Act.

4. *Other Proposals*

Related to these three proposals are others which would limit mergers in concentrated industries. Thus, as noted above, on p. 28, a 1968 article by James S. Campbell and William G. Shepherd would consider mergers presumptively unlawful in which the acquiring and

[9] It should be noted that the Federal Trade Commission has been engaged in an uphill struggle to require major manufacturing companies to disclose financial information on a product line basis. A March 1974 version of its reporting form, as approved conditionally by the General Accounting Office, was sent to 345 major companies in August 1974, requesting 1973 data. One third of the companies failed to comply. A revised form was sent out a year later to obtain 1974 fiscal data. Suits have been filed both by companies to force the FTC to stop its product line reporting program and by the FTC to enforce compliance. The outlook for the program is uncertain at best.

the acquired firm are each any of the three to six largest firms in at least one concentrated industry (one in which four-firm concentration is above 40 percent) and which is an industry with assets of over $100 million.[10]

Similarly, William James Adams in 1974 made a sweeping suggestion "to establish a rebuttable presumption against any of the leading 200 firms in the country either acquiring another corporation or adopting one of the restrictive practices identified in the Clayton Act (such as requirements contracts or exclusive dealing). In effect, such a procedure would express the belief that once a firm reaches a certain scale, the probability it will injure competition by means of integration or certain business practices is so great that the firm should carry the burden of justifying its desired course of conduct." [11]

Somewhat more comprehensive is an earlier proposal by Louis B. Schwartz for a law prohibiting a corporation with assets in excess of $250 million, or any corporation which ranks among the top eight producers in an industry where the eight-firm concentration ratio is 70 percent or higher, from:

1. Acquiring the stock, assets, or property of another company;
2. Granting or receiving any discrimination in price, service, or allowance, except where such discrimination can be demonstrated to be justified by savings in cost;
3. Engaging in any tie-in arrangements or exclusive dealership; and
4. Participating in any scheme of interlocking control over any other corporation.

In addition, such firms shall be obligated to:

5. Perform the duties of a common carrier by serving all customers on reasonable and nondiscriminatory terms;
6. License patents and know-how to other firms on a reasonable royalty basis; and
7. Pursue pricing and output policies calculated to achieve capacity production and full employment.[12]

The recent move within the Congress to break up the major petroleum companies is a reflection of broad public concern with existing market power, going well beyond the curbs on mergers, which is the essence of most of the proposals just mentioned. In this respect it follows the thrust of the Hart Industrial Reorganization Bill. The bill, S. 2387, 94th Congress, introduced by Senator Bayh (Indiana) and others as the Petroleum Industry Competition Act of September 22, 1975, would require companies engaged in petroleum production, marketing, refining, and transportation to divest themselves of all but one phase of the business. It was favorably reported, by an 8–7 vote, by the Senate Judiciary Committee on June 15, 1976. The forces in opposition to, as well as in favor of, this divestiture bill, are so strong as to make passage unlikely in the near future. The potential impact of the bill on prices and production is difficult to assess. It seems likely that its effect will be less than that of other factors affecting the petroleum industry, notably the bargaining power and tactics of the

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[10] Campbell, James S. and William G. Shepherd. Leading-firm Conglomerate Mergers. Antitrust Bulletin, v. 13, Winter 1968: 1361–1382.

[11] Adams, William James. Market Structure and Corporation Power: The Horizontal Dominance Hypothesis Reconsidered. Columbia Law Review, v. 74, November 1974: 1292.

[12] Schwartz, Louis B. Monopoly, Monopolizing and Concentration of Market Power: A Proposal. In Phillips, A., ed. Perspectives on Antitrust Policy. Princeton, Princeton University Press, 1965, pp. 117–128.

Organization of Petroleum Exporting Countries, and national economic policies for encouraging production and limiting consumption of petroleum in a period of probably increasingly tight supply.

Since most of the attention to proposals of this kind to limit market concentration is currently focused on the Hart bill, this paper will concentrate on some of the critical reaction it has evoked. Much of the criticism applies to the other proposals as well.

The presence or absence of "substantial price competition" is, in the view of many economists and lawyers, difficult to prove. A price increase in the face of declining cost and lowered demand, and price ridgidity in the face of fluctuating supply and demand are indicative of lack of price competition, but are not necessarily conclusive. More particularly, lack of price competition, which, if proved, would establish the existence of an undesirable condition, does not by itself prove specifically which firm or firms are responsible for this condition.

The share-of-the-market criterion has the same difficulties inherent in most merger cases before the courts today—the controversies surrounding the definition of relevant markets, both product markets and geographic markets. Some of the objection to the bill would be met if the critical measure of four-firm concentration were raised to 70 percent, and minimum sizes for industry and oligopoly firms were set.[13] On the other hand, much litigation may be expected on permitting as a defense against a divestiture that it would result in a loss of substantial economies; this defense could be expected to be invoked with regularity and persistence.

The choice of the seven industries specifically cited by the bill for investigation and possible restructuring raises controversial issues. The mere listing of these industries as targets may be considered discriminatory. For an industry as broad as "energy", it is difficult to believe that a reorganization plan could be devised that could be equitable to all parties without seriously adverse effect on some firms within the industry, their employees, investors, and customers.

The difficulties inherent in these attempts to establish workable limits to excessive market power have led to some suggestions for alternative approaches that are less drastic but which might be useful in achieving at least partially the same goals. Rather than attempting to limit the size of firms, it may be possible to reduce the barriers to market entry. Setting limits to advertising expenditures of established firms, if such advertising is shown to be a significant barrier to entry, has been suggested. There is a question, however, whether such a limitation would represent a violation of the First Amendment protection of freedom of speech. Another approach is to require firms with large market power to make patents available for license at reasonable terms to new competitors.

As noted on p. 31, there appears to be ample, and perhaps growing, opportunity for financial institutions to exercise considerable control over companies in such a way as to reduce competition. The potential through interlocking directorates, stock holdings, and loans and lines of credit is substantial. Disclosure of the extent of these relationships might do much to keep them in check. It has also been proposed (see p. 31 above) that a financial institution or its nomi-

[13] Blake, Harlan M. Legislative Proposals for Industrial Decentralization. In: Industrial Concentration: The New Learning, p. 359.

nees be prohibited from voting the stock (either directly, by proxy, or otherwise) which it holds in two or more competing firms. Limitations on representation on the boards of competing companies by financial institutions might also be worth considering.

Some believe that Federal incorporation laws could be useful as adjuncts to antitrust, if they incorporate such provisions as uniform and more comprehensive disclosure requirements and explicit antimonopoly standards. Finally, reference has been made above (pp. 29–30) to Senator Church's Multinational Business Enterprise Information Act, introduced this year. While the Act would be limited to acquiring of additional information, such information would be helpful in determining whether operations of these international firms are in violation of existing law or whether the law needs strengthening.

C. Making the Economy More Competitive

While the major part of this paper is concerned with the impact of antitrust law and administration on competition and with proposals for making antitrust policy more effective, the Federal Government obviously can and does influence the extent and vigor of competition in the economy in many other ways. In fact, many students believe that antitrust laws are of less significance than other measures which may be adopted to improve the environment for competition in this country.

As noted in chapter 2, (pp. 3–4), many laws and governmental policies are protective of monopolistic practices and tend to inhibit competition, by providing barriers to entry of new competitors and by protecting prices from the full impact of unfettered competition. They include Federal and State laws restricting entry into banking, the savings and loan business and other industries by means of charter requirements, and State laws and union rules restricting entry into professions, trades and occupations through high fees and unnecessarily stringent qualification and performance standards. They also include a host of subsidy programs for agriculture, shipbuilding, transportation, and other industries and trades. Moreover, businesses regulated by the independent regulatory commissions frequently are exempted from the antitrust laws. In addition, exemptions from the requirement for competitive bidding are provided on certain types of government contracts. Thus, for example, under the Concessions Policy Act (Public Law 89–249, approved October 9, 1965), concessionaires in national parks are permitted to operate as legal monopolies.

While a sweeping repeal of this kind of laws and regulations is hardly to be expected, there is a strong case to be made for investigating each of them and requiring a justification for their continuance on a case-by-case basis. The practical difficulties in the way of repealing exemptions to the antitrust laws and other anti-competitive government policies are of course formidable. Strong vested interests have become attached to each of the exempted industries and trades. There may, in fact, be sound economic justification for some of the exemptions, such as in the case of certain natural monopolies, or social justification in the case of the exemption of labor organizations.

Some steps, actual and proposed, are underway to modify this support of anti-competitive practices. Repeal of fair trade laws has been noted above (pp. 15–16) as have attempts to modify the Robinson-Patman Act (p. 15). The administration is seeking to modify the regulation of airlines by the Civil Aeronautics Board, to permit a greater degree of price competition without government interference. It has also submitted draft legislation, the Motor Carrier Reform Act, to relax control of the Interstate Commerce Commission over trucking and bus companies. Similar actions are being proposed in regulation of natural gas. And the possibilities of permitting more competition in other transportation modes are being given serious study. In general it needs to be recognized that conditions of natural monopoly that may have existed at one time may change drastically with new technological and market developments. Consequently protection by regulatory agencies, justified once, may now be quite contrary to the public interest.

As noted above, regulatory commissions and other regulatory agencies have usually been able to subordinate antitrust considerations to other factors in their regulation of firms under their jurisdiction.[14]

Although they are to a considerable extent exempt from antitrust law, such exemption is not complete. Thus the Department of Justice is increasingly involved in screening mergers by regulated firms, such as airlines, electric utilities, banks, and railroads. A more systematic policy of intervening by the Justice Department could be a useful but less drastic step than broad deregulation towards bringing about more genuine competition among firms in regulated industries.

Some progress is also evident in the relaxation of restrictive practices of trades and occupations. Specifically the immunity of learned professions from antitrust laws appears to be losing ground. Guilds of practitioners of various trades, occupations and professions have for centuries attempted, often successfully, to enforce regulations that restrained competition and that thereby had the effect of raising prices above their competitive levels. These practices include licensing provisions, restricting entry into the business or profession, and limiting or prohibiting advertising, often through so-called codes of ethics.

Impetus to removing such anti-competitive restrictions, specifically the restrictions against advertising, was given by the Supreme Court decision on June 16, 1975, in the case of Goldfarb v. Virginia State Bar (95 S. Ct. 2004 [1975]), which held that a bar association cannot as part of its code of ethics attempt to prescribe a minimum fee schedule. As a result of the Supreme Court decision, the Justice Department has obtained consent judgments under which public accountants and architects have agreed to abandon their restrictions on price competition. Similarly, on May 24, 1976, the Supreme Court in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., found that the Board's ban on advertising of prescription drug prices was unconstitutional.

Medical practitioners still resist. In September 1975 the Department of Justice filed suit against the American Society of Anesthesiologists charging it with raising and fixing fees by distributing fee

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[14] See pp. 11–12; however, S. 2028, 94th Congress, The Competition Improvement Act of 1976, reported by the Senate Judiciary Committee on July 21, 1976, would require regulatory agencies to apply a rigorous antitrust standard in formulating policies and practices that affect competition.

guidelines to all its members. The suit is still pending. Also at the beginning of 1976 the Federal Trade Commission filed an antitrust complaint against the American Medical Association's ban on doctor advertising. How far these moves will go cannot yet be foreseen. But they do provide a wedge into the protective cover against competition which governments, especially State and local, have granted to practitioners of certain fields through licensing and condoning other restrictive business practices.

Government policy on inventions and research might well be revised in the interest of greater competition. The following proposals might be considered: (1) establishing a clearing house to make inventors, entrepreneurs and investors more aware of opportunities for exploitation of inventions and new technologies; (2) provision for compulsory licensing of patents by firms exercising a significant degree of market power; (3) a government research policy which would provide more benefits to new and small businesses. Related would be modification of procurement laws and regulations that would encourage greater participation by smaller firms. Tax laws could be amended to attract capital to small, innovative companies, and to provide less incentive for merger. The elimination of import quotas and lowering of protective tariffs would, most economists agree, have a beneficial impact on competition.

Even government ownership has been, and can be, used to enhance competition. The Tennessee Valley Authority, for example, stands as the classic case of a government business established in part at least to serve as a competitive yardstick to private operators.

Government rescue operations, such as those of the Reconstruction Finance Corporation in the depression of the 1930's, may be seen as helping preserve competition at a time when many businesses in the nation were threatened with severe losses and bankruptcy. Technical and strategic factors account for some government enterprises, such as the uranium enrichment plants. Once elements of high economic risk and security factors are successfully resolved, the pressure for private participation by firms willing and able to participate in the field is likely to be great enough to make such participation likely. In fact, private firms operating these uranium enrichment plants and others are potential bidders to own them as well.

One proposal, by Dean Neil Jacoby, that may merit some consideration is the establishment of an Office of Competition within the Executive Office of the President or an independent Competition Commission.[15] Such an agency would be charged with analyzing the effects of all public and private actions upon competition, and would recommend to the President and the Congress actions needed for effective competition. It would also be expected to make studies of existing laws, regulations and practices that impair competition and to recommend removal of those judged not to produce offsetting social benefits. Establishment of such an agency would in effect institutionalize the goal of effective competition, Jacoby believes.

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[15] See: Jacoby, Neil H. Antitrust or Pro-competition? California Management Review, v. 16, Summer 1974: 57–58.

VII. CONCLUSION

Most of the recommendations in the previous chapter are designed either to strengthen the antitrust laws and their enforcement, or to strengthen competition directly. These programs need not be mutually exclusive. As Walter Adams said in 1974:

> Public policy must come to grips with private action to restrain trade and to entrench power as well as with governmental policies of restrictionism, protectionism, and subsidization. It is not an either/or choice. If the ultimate objective is free markets and a decentralized economic power structure, we have no alternative but to attack on both fronts.[1]

In terms of strengthening antitrust by means of attacking directly highly concentrated market power by means of proposals like the Hart Industrial Reorganization bill, certain results could be anticipated as likely to occur. Were such a bill passed, it could be expected to increase competition, but perhaps at the cost of some reduction in efficiency. Neither the magnitude of gains to competition nor the potential costs in efficiency can be reliably predicted, given present knowledge. But the consensus of expert opinion appears to be that, when measured against total productivity of the economy, both the potential gains and the potential losses are likely to be modest.

The same uncertainties will prevail in terms of attempts to get rid of statutes, regulations, and other government policies that protect monopolistic structures and practices that diminish competition.

The impact of proposals to deregulate some of the activities currently under regulation by the various independent regulatory commissions is difficult to assess, and is likely to differ substantially among various industries and trades.

A greater consistency in the policies for dealing with monopolistic and anticompetitive behavior would seem essential. A strict policy against anticompetitive mergers coinciding with a *de facto* policy of condoning existing firms with excessive economic power is disruptive of public confidence in both the fairness and effectiveness of antitrust policy. Rectifying that discrepancy, even partially, could contribute to restoration of such confidence.

In the final analysis more than economic calculations weigh in the balance. A major element in antitrust policy will always have to be judgment as to what will contribute realistically toward the kind of political and social order we aspire to.

More than sixty years ago, Allyn Young wrote:

> The case for monopoly is exceedingly dubious and, at best, has a validity that is restricted and conditioned in many ways. Moreover, such considerations are relatively unimportant compared with matters like the effect of monopoly upon distribution, upon the scope for individual initiative, upon economic opportunity in general, and upon a host of social and political relations. In short, it is a question less of the relative 'economy' of monopoly or competition than of the kind of

[1] Adams, Walter. Corporate Power and Economic Apologetics: A Public Policy Perspective. In: Industrial Concentration: The New Learning, p. 373.

economic organization best calculated to give us the kind of society we want. Until our general social ideas are radically changed, it will take more than economic analysis to prove that it would be sound public policy to permit monopoly in that part of the industrial field where competition is possible.[2]

In a not dissimilar vein, the famed advocate of free enterprise, Henry Simon, wrote in 1934:

Even if the much-advertised economies of gigantic financial combinations were real, sound policy would wisely sacrifice these economies to preservation of more economic freedom and equality . . . Few of our gigantic corporations can be defended on the ground that their present size is necessary to reasonably full exploitation of production economies; their existence is to be explained in terms of opportunities for promoter profits, personal ambitions of industrial and financial "Napoleons", and advantages of monopoly power. We should look toward a situation in which the size of ownership units in every industry is limited by the minimum size of operating plant requisite to efficient, but highly specialized production—and even more narrowly limited, if ever necessary to the maintenance of freedom of enterprise.[3]

It is of course not enough to base a program of action on the philosophy of wise men expressed decades ago. Drastic changes in the past half century require a new look at the various facets of economic power, the role of giant corporations in the nation and of multinational corporations throughout the world, and the extent to which economic power is exercised in the interest of, or in opposition to the interest of society, and where the loci of such power are. Policy formulation must be based upon a realistic assessment of these changes. But it must as truly be recognized that it cannot be successfully undertaken without full regard for the standards of conduct which the American people have found basic to their sense of justice, standards which have found expression in their laws and courts of law.

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[2] Young, Allyn A. The Sherman Act and the New Antitrust Legislation. Journal of Political Economy, v. 23, March 1915: 214.
[3] Simon, Henry C. A Positive Program for Laissez-Faire; Some Proposals for a Liberal Economic Policy. (Public Policy Pamphlet No. 15). Chicago, University of Chicago Press, 1934, p. 13, 20–21.

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