

WASHINGTON ANTITRUST REPORT

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PUBLISHER'S NOTE

Warning Signs On Antitrust

Antitrust reform is in serious trouble. The Administration's efforts to legislate less restrictive antimerger guidelines seem stymied and transportation deregulation may well be reversed under the guise of imposing "responsible" antitrust restrictions. Moreover, actions by the Justice Department and the Federal Trade Commission suggest flagging support for antitrust reform within these agencies.

These problems were illustrated by the Coke and Pepsi merger cases, in which the FTC missed an important opportunity to educate the public on how the antitrusters play the market-definition game. Defining a market only in terms of the products most closely competing today and ignoring those substitutes that would be relevant were the merged firm to "exploit" consumers is a gambit that could have and should have been exposed. That didn't occur. Instead, the media portrayed the proposed acquisitions as efforts by monopoly-seeking businessmen to deprive us all of thirst quencher choices. The FTC decision, combined with the recent decisions of the ICC and the DOT to block key airline and rail transportation mergers, has created a public perception of an Administration retreat on antitrust.

Of course, the extent to which William Baxter and his successors in the Reagan Justice Department have sought reform has always been in doubt. Throughout the Reagan Administration, mergers have been blocked consistently. The merger guidelines themselves embody only a mild and arbitrary liberalization of past practices. Yet recent events suggest that even this mild liberalization will be abandoned.

This would reassure the press. It wouldn't have to think anymore. The rules of the game would once more be clear: all business reorganizations are illegal until blessed by some bureaucrat at the FTC or Justice.

The pro-regulators have used this period of confusion skillfully. Professor Pitofsky, one of the several former FTC officials continuing to advocate a pro-regulatory agenda and a chronic critic of antitrust deregulation, stated in a recent Washington Post editorial:

"When you've got a deregulated industry, antitrust enforcement becomes the only real way that the government can prevent monopolies on the marketplace."

and later:

"With antitrust, the strategy is to make sure there are enough players to insure a competitive market."

Those championing the concentration theory of competition have regained the initiative.

Unfortunately, we have not been very effective in countering this view. Jule Herbert several months ago responded to the initial "concerns" of Alfred Kahn, "father of airline deregulation," in the enclosed Wall Street Journal article entitled, "The Reregulatory Threat of Antitrust." More recently, Professor Armentano responded to Professor Pitofsky's support of the Administration's Coca-Cola case in a New York Times piece (enclosed). Also, as detailed in this issue, several excellent papers and monographs making the case for rethinking the antitrust regulatory laws have recently appeared. Nonetheless, that material is not widely known and has yet to find its way to those in the media covering antitrust issues.

Since many, and perhaps most, businessmen prefer the safeguards against "excessive" competition embodied in the antitrust regulations, those favoring antitrust reform must rely heavily on empirical and analytical arguments for reform. We must make a compelling intellectual case since we are unlikely to win a purely political fight. We must respond to the pro-regulation editorials and stories that appear in the papers. We should write much more on this topic for general audiences and educate reporters on the nature of competition. Op-eds clarifying the "market definition" game played by the antitrusters would be valuable, as would articles explaining how market competition differs from the "perfect competition" model relied on by apologists of government intervention. Whenever possible, we should also appear on policy programs to debate those favoring antitrust regulation.

If antitrust reformers don't become more active, the outlook is dim.

By Fred L. Smith, Jr.
President, C.E.I.

RECENT ANTITRUST RULINGS

Action on Three Airline Mergers

Over the summer, the Department of Transportation (D.O.T.) took action on three airline merger proposals, giving final clearance to two acquisitions and tentative approval to another. On July 31, D.O.T. accepted an earlier administrative law judge recommendation and gave

final approval to the acquisition of Republic Airlines by Northwest Airlines. Dismissing the Justice Department's argument that the merger would hurt competition in Minneapolis (where both airlines now operate a hub), D.O.T. concluded that actual and potential competition will be sufficient to discipline the behavior of the merged carrier.

On September 15, D.O.T. granted final approval to T.W.A.'s takeover of Ozark Air Lines. Although the Justice Department also opposed this merger, claiming it would reduce competition in St. Louis, D.O.T. held that other airlines could still provide sufficient competition.

The third proposed acquisition, Texas Air's takeover of Eastern Airlines, was tentatively approved by D.O.T. on September 19. At first, D.O.T. rejected the merger, citing lessened competition on the busy New York-Washington and Boston-New York corridors. But after Texas Air agreed to sell twelve additional landing slots in New York and Washington, D.O.T. reversed itself. In the meantime, Texas Air announced it would purchase People Express, another major competitor on the Washington-New York route. No D.O.T. decision on this merger, which would make Texas Air the largest airline in the U.S., has been made.

F.T.C. Rejects Cola Mergers

On June 20, the Federal Trade Commission voted 4-0 to oppose the proposed acquisition of the Dr. Pepper Co. by Coca-Cola and the purchase of Seven-Up by PepsiCo. Soon after the commission vote, Pepsi dropped its bid for Seven-Up. Coca-Cola, however, did not, and the Commission filed an action in federal court to stop the merger. In a July 3 decision by Judge Gerhard Gesell of the U.S. District Court for the District of Columbia, a preliminary injunction to stop the merger was issued. Coke later elected to drop its merger efforts.

I.C.C. Rejects Santa Fe - Southern Pacific Merger

In yet another merger case, the Interstate Commerce Commission on July 24 voted 4-1 to reject the merger of the Southern Pacific and Santa Fe Railroads. Only Chairman Heather Gradison voted in favor of the merger. The decision came as a surprise to most industry observers, most of whom expected the Commission to attach conditions upon the deal, but approve it. This was the first time since 1966 that the I.C.C. had rejected a railroad merger. This decision is likely to chill prospects for future rail mergers. In the short run, however, the decision dealt a strong blow to the hopes of Norfolk Southern of acquiring Conrail, as those who opposed that merger on competitive grounds were given new ammunition. Norfolk Southern formally withdrew its bid for the federally owned railroad on August 24.

Odd Results in Football Cases

On July 29, a federal court jury in New York found the National Football League guilty of monopolizing the professional football market, and awarded the rival United States Football League \$1 in damages. After trebling, the award totals \$3.

Founded in 1983, the U.S.F.L. for three years played its games during the spring. After the 1985 season, the league decided to move its schedule of games to the fall (beginning in 1986), so that it could compete directly against the N.F.L. Upon discovering it could not land a network television contract for fall football, the U.S.F.L. sued its older rival under the Sherman Act for \$1.69 billion, and demanded injunction relief to void one of the N.F.L.'s three network contracts. After the verdict was announced, the U.S.F.L. suspended play for the 1986 season.

In another football antitrust case, Los Angeles Coliseum Commission v. National Football League, the Ninth Circuit overturned an award of damages against the N.F.L. for attempting to prevent the then-Oakland Raiders from moving to Los Angeles.

In a previous decision, the court held that the N.F.L. rule requiring league approval of any franchise relocation was an illegal conspiracy to restrain trade, and that the league was liable for treble damages. In this case, the court ruled that the difference between the value of a franchise in Los Angeles and a franchise in Oakland must be deducted from the damage award. The value of a Los Angeles franchise was a business opportunity belonging to the league as a whole, it reasoned, and should not be given to the Raiders at no cost. Thus, the \$60 million jury award against the N.F.L. will be substantially reduced, or offset entirely. Perhaps more important, the decision means that while leagues cannot directly prevent franchise relocations, they can severely discourage such moves by charging for the lost business opportunity.

Recent Works

*D.T. Armentano, Antitrust Policy: The Case for Repeal (Cato Institute, 1986), 74pp. Dr. Armentano, a professor of economics at the University of Hartford, argues that the Reagan Administration's antitrust law reforms haven't gone far enough, and that the time has come for total repeal of all antitrust laws. While Dr. Armentano's proposals are unlikely to be adopted tomorrow, his book is sure to influence future debate on antitrust policy. Available from the Cato Institute, 224 Second St., S.E., Washington, D.C., 20003, (202) 546-0200.

*William F. Shughart II, Antitrust Policy in the Reagan Administration: Pyrrhic Victories?, Working Paper #13, Center for Policy Studies, Clemson University, April 1986, 27pp. Dr. Shughart, an associate professor of economics at George Mason University, surveys antitrust policy during the Reagan years and finds a mixed record of success and failure. He argues

that changes in antitrust policy in the Reagan era have been caused by changes in administrators, rather than in the law or institutions of antitrust, concluding that "better people can make better government, but only temporarily." Available from the Center for Policy Studies, College of Commerce and Industry, Clemson University, Clemson, S.C., 29631.

*William B. Tye, Encouraging Cooperation Among Competitors: The Case of Motor Carrier Deregulation and Collective Ratemaking, 283pp. In this as yet unpublished manuscript, Tye, a principal of Putman, Hayes, and Barnett, an economic consulting firm in Cambridge, Massachusetts, makes a case for retaining antitrust immunity for truckers. He argues that the trucking industry's "rate bureaus" have been unable to maintain supracompetitive prices since deregulation of the industry, and thus present little threat to consumers. On the other hand, by simplifying ratemaking, the bureaus reduce transaction costs, and actually increase competition by making it easier for smaller carriers to compete. For more information, contact Dr. Tye at Putnam, Hayes, & Barnett, Inc., 124 Mt. Auburn Street, Cambridge, MA, 02138, (617) 492-6100.

*Robert E. Weigand, "Is It Time to Retire Robinson-Patman?", Wall Street Journal, June 20, 1986. Weigand, a professor of marketing at the University of Illinois at Chicago argues that the Robinson-Patman Act is outdated, unnecessary, costly, unenforceable, and discourages competition. He concludes that it is time to discuss repeal of the Robinson-Patman Act.

*Basil Yamey, "The New Anti-Trust Economics", in The Unfinished Agenda: Essays on the Political Economy of Government Policy in Honour of Arthur Seldon (Institute of Economic Affairs, 1986), pp65-78. In this essay, Dr. Yamey, a professor of economics at the London School of Economics, reviews the "new antitrust economics" with particular emphasis on thinking regarding vertical restraints. He criticizes the notion that economists or courts can determine whether any type of restraint increases or decreases consumer welfare.

Projects Underway

Jerry Ellig, an analyst for Citizens for a Sound Economy and doctoral candidate at George Mason University, is planning to write a dissertation on antitrust law and professional sports leagues. He will argue that league rules regarding market division and revenue sharing allow the members of a league to achieve efficiencies and produce a better product. Such agreements among members thus should not be a matter of antitrust concern. For more information, contact Jerry Ellig at Citizens for a Sound Economy, 122 "C" St., N.W., Suite 700, Washington, D.C. 20001, (202) 638-1401.

If you know of any antitrust news, recent works, or projects underway which should be published in this newsletter, please write to: Editors, the Washington Antitrust Report, Competitive Enterprise Institute, 611 1/2 Pennsylvania Ave. S.E., Washington, D.C., 20003.