RESOLVING UNCERTAINTIES UNDER OUR ANTIMONOPOLY LAWS THROUGH ADMINISTRATIVE ACTION

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Businessmen and others of the public seek but do not find an unqualified answer to the question, "What trade restraints and monopolistic acts are unlawful?" It requires no great amount of legal research to find out why that is true. The Anglo-Saxon common law has dealt with trade practices and monopolistic acts over a period of centuries. However, under the common law, trade practices and monopolistic acts are unlawful only when employed with the intent to coerce or damage a competitor or for the promotion of a monopoly.

Statutory law in this country regarding the subject is, with the exception of a few provisions applying to particular acts, almost as general and indefinite as the common law. Of course, when the Sherman Antitrust Act was passed in 1890, it was thought that the language of its provisions made more definite the law for the regulation of interstate and foreign commerce. Particular basis for that thought is found in the words of the first section of that law to the following effect: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal," and the words of Section 2 to the effect that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any ther person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

First, proposals were made that the Sherman Act be amended to provide for some exemptions from its application to certain conditions and practices. Those proposals were rejected. Then proposals were made to make the application of the Sherman Act more flexible by making it effective only where trade restraints and monopolistic conditions were found to be *unreasonable*.

At first the Supreme Court rejected proposals that it make the

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Sherman Antitrust Act indefinite by reading into it an interpretation which would make it applicable only to *unreasonable* restraint of trade.[1]

These proposals would have amended the Sherman Act to permit the continuation of a number of combinations in restraint of trade.[2]

Although these proposals were not acted on by the Congress, the law, through the process of judicial interpretation, was made almost as general and broad in its sweep as the common law of England and this country. A part of this development was the decision by the Court in the Standard Oil Case.[3] In that case the "rule of reason" was read into the Sherman Act and that law was, thereby, made to apply only to *unreasonable* restraints of trade. It was reasoned that the Sherman Act ". . . followed the language of development of the law of England." In that connection the Court held:

> "The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.
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> "Thus not specifying but indubitably contemplating and requiring a standard it follows that it was intended that the stand-

[1] U.S. v. Trans-Missouri Freight Assn., 166 U.S. 290 (1897); U.S. v. Joint Traffic Assn., 171 U.S. 505 (1898).

[2] In 1909, Sen. 6440, introduced in the 60th Congress, 2d Sess., proposed to amend the Sherman Act to give all corporations except railroad companies (already subject to the Interstate Commerce Act) immunity from antitrust prosecution unless notified within thirty days by the Commissioner of Corporations, with the concurrence of the secretary of Commerce and Labor, that any proposed contract or combination filed with the Commissioner of Corporations was in unreasonable restraint of trade. It would have limited the amount of recovery in a civil action for injury to business under Sec. 7 to single instead of threefold damages and, according to the Senate Judiciary Report on it, would have provided "that no prosecutions under the first six sections of the act should be maintained for past offenses unless the contract, or combination, be in unreasonable restraint of trade. . . ." Sen. Rept. No. 848, 60th Cong. 2d Sess. 9 (1909). The Senate Judiciary Committee rejected the proposed amendment, saying that to make "civil and criminal prosecution hinge on the question of reasonableness or unreasonableness . . . destroys . . . the provisions of the act as to criminal prosecutions, and renders them nugatory, and opens the door wide to doubt and uncertainty as to civil prosecutions. . . . The defense of reasonable restraint would be made in every case and there would be as many different rules of reasonableness as cases, courts, and juries." Guthrie, Constitutionality of the Sherman Anti-Trust Act of 1890, 11 Harv. L. Rev. 80 (1897) at 9-11.

[3] 221 U.S. 1.

ard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."

Thus it is seen that the Sherman Act thus interpreted is as Mother Hubbard's dress, covering almost everything but touching nothing in particular. The uncertainties inherent in such a situation were aptly described in the opinion of Justice Harlan, a member of the Supreme Court who participated in the decision in the Standard Oil case. He said:

"To inject into the act the question of whether an agreement or combination is *reasonable* or *unreasonable* would render the act as a criminal or penal statute indefinite and uncertain, and hence, to that extent, utterly nugatory and void, and would practically amount to a repeal of that part of the act. . . . And while the same technical objection does not apply to civil prosecutions, *the injection of the rule of reasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law. The defense of reasonable restraint would be made in every case and there would be as many different rules of reasonableness as cases, courts and juries.* What one court or jury might deem unreasonable another court or jury might deem reasonable. A court or jury in Ohio might find a given agreement or combination unreasonable."

The Federal Trade Commission Act is couched in general terms, making unlawful unfair methods of competition and unfair and deceptive acts and practices. The Supreme Court has ruled that the words "unfair methods of competition" are not defined by the statute and their exact meaning is in dispute. However, they have held them to be applicable to practices opposed to good morals because characterized by deception, bad faith, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. Woodrow Wilson appreciated the need for businessmen to be more precisely informed about the meaning of these general terms of the law. For that reason, in 1914 he asked two things:

(1) He asked that some additional legislation be enacted, stating that—

"The business of the country awaits also, has long awaited and has suffered because it could not obtain, further and more explicit

legislative definition of the policy and meaning of the existing antitrust law. Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is.

* * *

"Surely we are sufficiently familiar with the actual processes and methods of monoply and of the many hurtful restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain.[4]

* * *

"I think it will be easily agreed that we should let the Sherman antitrust law stand, unaltered, as it is, with its debatable ground about it, but that we should as much as possible reduce the area of that debatable ground by further and more explicit legislation; and should also supplement that great act by legislation which will not only clarify it but also facilitate its administration and make it fairer to all concerned." [5]

Congress responded to these suggestions by taking under consideration proposals contained in a bill introduced by Congressman Clayton of Alabama. Out of that grew the Clayton Antitrust Act, among the provisions of which are those condemning price discriminations, tieing and exclusive dealing arrangements, certain mergers and acquisitions, and interlocking directorates.[6]

(2) Wilson also asked that a Federal Trade Commission be created. He wanted such an agency, among other things, to assist businessmen in securing a better understanding of their responsibility under the law. In that connection, he stated:

"It is of capital importance that the businessmen of this country should be relieved of all uncertainties of law with regard to their enterprises and investments and a clear path indicated which they can travel without anxiety. It is as important that they should be relieved of embarrassment and set free to prosper as that private monopoly should be destroyed. The ways of action should be thrown wide open." [7]

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[4] *"The New Democracy,"* Woodrow Wilson, Vol. 1, p. 85.

[5] *Ibid.*, p. 75.

[6] 15 USC 12-19.

[7] Messages and Papers of the Presidents, Vol. XVI, Bureau of National Literature, Inc., pp. 7909-10.

On September 2, 1916, in his speech of acceptance on renomination to the presidency, Wilson restated his view of the function of the Commission in the following terms:

> ". . . a Trade Commission has been created with powers of guidance and accommodation which have relieved businessmen of unfounded fears and set them upon the road of hopeful and confident enterprise.[8]
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> ". . . We have created, in the Federal Trade Commission, a means of inquiry and of accommodation in the field of commerce which ought both to co-ordinate the enterprises of our traders and manufacturers and to remove the barriers of misunderstanding and of a too technical interpretation of the law. . . . The Trade Commission substitutes counsel and accommodation for the harsher processes of legal restraint. . . ." [9]

It is clear that it was intended by Wilson that with the establishment of the Federal Trade Commission we would have an agency which would apply the law against unfair trade practices on a broad basis in an effort to eradicate harmful practices in their incipiency. It was thought this would be done by specifying harmful trade practices item by item. In this way, it was thought, businessmen would be assisted in avoiding the continuation of practices which would make them liable as criminals under the Sherman Antitrust Act.

Unless the Federal Trade Commission undertakes the specification of harmful trade practices item by item, which probably would lead to trade restraints violative of the Sherman Act, businessmen will be left without guide lines of what is legal and what is illegal under our antimonopoly laws.

It is clear that the national public policy against monopolies and monopolistic practices and conditions precludes any thought of cutting down the scope of the sweep of the Sherman Act and the Federal Trade Commission Act. On that point, the Chief of the Antitrust Division of the U.S. Department of Justice has made this statement:

> *"When asked for comment on a legislative* proposal for antitrust exemption, we will take a long, hard look. With exceptions already covered by existing laws, we have seen no persuasive case for compromising any antitrust principles in special cases." [10]

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[8] *Ibid.*, p. 8151.

[9] *Ibid.*, p. 8158.

[10] Hon. Lee Loevinger, Asst. Attorney General, Record of the Hearings before American Bar Assn., Section of Antitrust Law, Vol. 18, pp. 103-4, April 6, 1961.

From existing circumstances and our experience, it is clear that public policy will continue to dictate that our antimonopoly laws continue with their broad sweep covering a multitude of unspecified trade practices and conditions. It cannot be expected that the Congress will undertake to specify in new legislation each of the trade practices and conditions likely to fall within the broad sweep of the Sherman Act and the Federal Trade Commission Act. Therefore, businessmen and the public are unlikely to enjoy flexibility, breadth and certainty under our antimonopoly laws unless there is action from day to day by an administrative law agency such as the Federal Trade Commission, devoted to spelling out and specifying what trade restraints and condiitons are unlawful, and aiding in the establishment of guide lines for avoidance of pitfalls leading to violations. Reference has been made to the responsibility of the Commission to proceed against unfair trade practices on an industry-wide basis. Hope has been expressed that the Federal Trade Commission will give attention to its responsibilities in this regard.

Considerable discussion has centered on the power of the Federal Trade Commission to make substantive rules which would cover industry-wide unfair trade practices. In this discussion, Section 6(g) of the Federal Trade Commission Act has been cited. It provides:

> "Sec. 6. That the commission shall also have power—(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act."

It is reasoned that this provision of the law could be relied upon to aid the commission in carrying out its responsibilities in prohibiting the unfair methods of competition and unfair and deceptive acts and practices made unlawful by Sec. 5 of the Federal Trade Commission Act.

This idea is not new. For a substantial period of time the Commission has utilized a trade practice conference procedure for the purpose of informing itself about industry-wide practices alleged to be unfair. It has proceeded to utilize that information in formulating statements of what the Commission believed to be applicable as law to the trade practices in question. These statements were designated as Trade Practice Rules and were designed to afford guidance to industries and enable them to voluntarily operate in compliance with the interpretations of the law by the Commission and the courts. It was hoped that

through such advisory rule-making procedures there would be voluntary compliance with the acts administered by the Commission.

The Commission as early as 1918, some three years after its organization and nearly one year before its first formal case was decided in the courts,[11] was confronted with an industry-wide practice of misbranding gold finger rings. In lieu of proceeding formally against the individual manufacturers involved, the Commission designated a Commissioner to hold conferences with members of the industry and recommend an acceptable disposition of the entire matter, which would end the abuse and eliminate the resultant consumer deception. As a result of that conference, the members agreed upon proper markings for their products which were acceptable to the Commission, and that agreement became effective on May 1, 1919. The records indicate that the agreement was 100 per cent effective and ended the abuse.

Since that early beginning there has gradually evolved the Commission's present Trade Practice Conference Program. In the intervening years, in excess of 250 United States industries have, at one time or another, operated under various forms of trade practice rules. Today, rules are in effect for 163 industries. Huston Thompson, Chairman of the Commission in 1921, has written that the Trade Practice Conference procedure was developed to meet situations where one member of an industry started an unfair method of competition and others in the industry were forced to adopt it in the interest of self-preservation, with the result that the Commission would be deluged with complaints.[12]

Trade practice conferences have been initiated at all stages in the progress of unfair practices within an industry. They have run the gamut of fairly standard rules where the law has been well settled in case decisions and the practices fairly uniform to the detailed working out of express standards for guidance of industries early in the history of the emerging industry and in the initial stages of unfair practices within the industry.

In more recent years, the trade practice rules have been more often utilized to afford detailed and specific guidance to industry on specific problems of compliance which were peculiar to the industries affected and in the early stages of the use of unfair

[11] Sears Roebuck and Co. v. Federal Trade Commission, 285 Fed. 307, C.C.A. 7 (1919).

[12] Jan.-Feb., 1940, *George Washington Law Review*, pp. 268, 269.

methods. Illustrative of this trend was the promulgation of the Rayon Rules.[13] This new industry, producing a product which closely resembled silk in appearance and texture, was susceptible of deceiving consumers by its appearance alone, and, additionally, terminology was developing in the many industries using the product which enhanced that deception. The Rayon Rules carefully spelled out detailed instructions concerning the requirements of effective marking of products made of the material and prohibited specific designations. These rules have been revised through the years to meet additional problems with the technological developments of composition and manufacture, and they were a forerunner of the present Textile Products Labeling Act.[14]

A cursory examination of trade practice rules enacted in the past 10 years shows that the Trade Practice Conference procedure has been used increasingly in industry after industry to afford guidance to members in new industries or where practices deemed violative of Acts administered by the Commission were in the initial stages.

An example is the recently promulgated rules for the pleasure boat industry.[15] That industry, as you know, has had tremendous growth in the past few years. Competitive as well as deceptive practices grew with the expansion of the industry. They involved representations as to power, safety, composition of hull, durability, and confusing guarantees. In cooperation with that industry, the rules carefully spelled out answers to all of these and other problems, which, if not solved, would have resulted in involvement with the Commission by a substantial segment of the industry and multiple practices.

It is difficult, if not impossible, in the case of many rules to evaluate their effectiveness for a number of reasons:

1. No accurate measurement of the number of violations existing prior to promulgation of the rules is available;

2. In most such proceedings there is no thorough, complete industry-wide investigation after the promulgation to determine the number and nature of continuing violations; and

3. In increasing numbers of industries, rules involving specific practices have been developed early in their usage, and their

[13] Rayon Industry, promulgated 10/26/37.

[14] Textile Fiber Products Identification Act (approved on September 2, 1958, 85th Cong., 2d Sess; 15 U.S.C. § 70, 72, Stat. 1717), promulgated on March 3, 1960.

[15] Promulgated on August 4, 1961.

service lies not only in ending existing abuses, but it is frequently much greater in the prevention of future abuses.

Students of FTC procedure and the laws it administers have praised the benefits of the Trade Practice Conference procedure. An article in the George Washington Law Review [16] concludes that the procedure "has performed for industry and the public a great educational service, the value of which in eliminating unethical practices, and cutting the cost of law enforcement, cannot be overestimated."

The Attorney General's Committee on Administrative Procedure [17] made this statement:

> ". . . even where formal proceedings are fully available, informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process. No study of administrative procedure can be adequate if it fails to recognize this fact and focus attention upon improvement of these stages."

In a number of cases where the courts have had occasion to consider the applicability of trade practice rules in particular cases, they have commented favorably on the rules and upheld the principles enunciated in them.[18]

In addition to these cases, the value of interpretive opinions and rules has been often considered and examined by the Supreme Court. Perhaps the Supreme Court's opinion of such procedures is best summed up in the case of *Skidmore* v. *Swift & Co.*[18a] as follows:

> ". . . The Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. * * * This court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.

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[16] Silver Anniversary Edition, Jan.-Feb. 1940, p. 450.

[17] Final Report published 1941, on p. 4.

[18] Prima Products, Inc., et al. v. Federal Trade Commission, 209 Fed (2d) 405, (2d Cir., Jan. 7, 1954). Northern Feather Works, Inc. and Sumergrade & Sons v. F. T. C., 234 F. (2d) 335 (3rd Cir., 1956). Lazar et al., v. F. T. C., 240 F. (2d) 176, (7th Cir., 1957).

[18a] 323 U.S. 134 (1944).

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."

On September 15, 1955, the Commission initiated a new method of interpretive rules in the form of Guides. The first Guide adopted on the above date covered cigarette advertising. Prior to the adoption of those guides, the Commission had obtained final cease and desist orders in seven cases and negotiated 17 stipulations involving cigarette advertising.

In 1954 and early 1955, the Cigarette Industry embarked upon an intensive advertising program of filter-tip cigarettes. That advertising campaign coincided with widely disseminated information linking cigarette smoking to adverse effects on health. Since the adoption of the Cigarette Advertising Guides, in excess of 200 individual instances of questionable claims have been promptly discontinued when brought informally to the advertiser's attention. Of equal or greater importance is the fact that in substantial numbers of instances where new advertising themes in that industry were contemplated, they were and are presented to the Commission staff in advance and then conformed to the informally expressed views of the staff, thus avoiding the dissemination of deceptive claims in the first instance.

The Commission's files are replete with information to the effect that in many instances the wide publicity given to the Commission's Trade Practice Rules and its statements of Guides, have had a wholesome effect in improving compliance with law. However, the sad fact about the matter is that in a number of very important areas, industry-wide practices adverse to the trade generally, and apparently inconsistent with the law, have been continued despite the full light of pitiless publicity of the Commission's Trade Practice Rules and Guides. In these instances, it would appear that what is needed is some mechanism to enforce, on an industry-wide basis, a compliance with the law against unwholesome and destructive trade practices. This is particularly true in those instances where the use of the unfair trade practice involves large numbers, perhaps hundreds, in a given industry. Obviously, it is impractical and, perhaps, unfair, to proceed against one or two in such a situation through litigation, and leave the others free to continue the questionable practices.

In recent months, concern with this crisis in the administrative process has deepened. More than ever it is believed that these untested but promising rule-making procedures should be explored for use as a supplement to adjudicative work. Pursuant to specific statutory authority, the Federal Trade Commission and other administrative agencies have already engaged in broad-scale substantive rule-making; and these processes have consistently been validated in the courts. Examples are this Commission's rules under Fur, Wool, Textile and Flammable Fabrics Acts, as well as far-reaching rule-making activities of the Food and Drug Administration, Treasury Department, and Internal Revenue Service.

While it may be contended that these are specialized grants of power in closely-defined regulatory contexts, it is believed that adequate substantive rule-making authority exists under the Commission's organic statute to permit this kind of rule-making proceedings. Reference is made to the broad powers of Section 5 of the Federal Trade Commission Act. Also, as has been stated, Section 6(g) of the Federal Trade Commission Act empowers the Commission "from time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act." This authority in terms, is plenary; and there is nothing elsewhere in the statute to suggest that Congress did not intend Section 6(g) be given an expansive construction consistent with the purposes of the legislation. Thus, the courts have already made it clear that the Commission's Rules of Practice, properly adopted pursuant to the basic statutory grant of Section 6(g), have the force and effect of law.[19] Should it be conceded, short of a judicial declaration, that substantive rules properly adopted under Section 6(g)'s grant would be any less valid? The public interest now commands an early test of whether Sections 5 and 6(g) afford sorely needed substantive rule-making remedies in aid of lagging quasi-judicial authority.

The rule-making process, as has often been pointed out, is that aspect of the administrative process most analogous to the statute-making power of the legislature. It is thus to be contrasted with the administrative adjudicative process, which most resembles the decision-making of the courts. Too often, in stressing adjudicative powers and in analogizing our activities to those of the

[19] Kritzik v. Federal Trade Commission, 125 F. 2d, 351 (7th Cir. 1942); Hill v. Federal Trade Commission, 124 F. 2d 104 (5th Cir. 1941).

courts, we fail to remember that both functionally and conceptually we are fundamentally an agent of the legislature. As the Supreme Court said in *Humphrey's Executor* v. *United States,*[20] the Commission's duties are not only quasi-judicial but also quasi-legislative.

Professor Fuchs defines rule-making as "the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations;" [21] and another commentator states that "What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in an individual capacity." [22]

Rule-making and adjudication are necessary and complementary weapons in the arsenal of administrative powers. So long as appropriate procedural safeguards are provided, the agency's choice of one mode or the other is not subject to judicial attack. In the noted *Storer* case,[23] for example, we find a dramatic example of the government's using rule-making and adjudication as its one-two punch. There the Federal Communications Commission, without hearing, denied Storer's application for an additional television station license. The sole basis for this denial was that granting the application would violate a Commission rule against a multiple ownership of stations. That rule had been enacted earlier the same day.[24]

On November 30, 1961, the United States Court of Appeals for the District of Columbia, in the case of *Wisconsin* v. *Federal Power Commission et al.,* held that an action by the Federal Power Commission to set guide lines by which it will be controlled in its regulatory functions is within its authority under the Natural Gas Act. Under that Act the Federal Power Commission was authorized to make determinations regarding rates, charges or classifications observed, charged or controlled by *any natural gas company,* and in that connection to determine the justness and

[20] 295 U.S. 602, 625 (1935).

[21] Fuchs, *Procedure in Administrative Rule-Making,* 52 Harv. L. Rev. 259, 265 (1938).

[22] Dickinson, *Administrative Justice—The Supremacy of Law,* p. 21 (1927).

[23] United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

[24] But cf. Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194 (1947).

reasonableness of what the gas company demanded. The Power Commission found that by proceeding against individual companies through the use of the case by case method, it was failing to carry out effectively the Congressional mandate. It chose to meet the problem by a rule-making process by which it would make a determination of what was reasonable and make its determination applicable to the operations of all of the companies operating in a particular area. This the court held it may do under the general terms of the Natural Gas Act.

There are, of course, a number of questions which arise in connection with possible use of rule-making procedures, e.g., whether rules would have retroactive effect; [25] whether they would be "substantive" or "interpretative;" [26] the extent to which a reviewing court will be free to substitute its judgment for that of the Commission.[27] To meet the requirements of due process, a substantive rule would necessarily be founded upon clearly defined standards and the rule itself expressed in such definite terms that persons subject to it would have no doubt about its meaning. But it seems that these are largely questions relating to the ultimate effect of a particular rule or to the allowable scope of judicial review, and it is believed we should not permit such questions to obscure the need for such powers or to weaken our resolution to proceed with an appropriate test of our existing authority.

Selective and prudent use of rule-making proceedings and their foundation upon clearly established standards after investigation may be vastly beneficial, both to the public interest and to concerned businessmen. We can envision a type of proceeding which would probe in depth such broad industry problems and, which, after full observance of the procedural requirements of the Administrative Procedure Act, would terminate with a general rule prohibiting the practice. Examples immediately spring to mind of recurring problems which the Commission has handled on a case-by-case basis in the past but which might more effectively—and economically—have been approached via a substantive rule-making route: The purchasing activities of wholesale

[25] Cf. Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129 (1936).

[26] Compare Skidmore v. Swift & Co., 323 U.S. 134 (1944), with American Telephone & Telegraph Co. v. U.S., 299 U.S. 232 (1936). See Griswold, *A Summary of the Regulations Problem*, 54 Harv. L. Rev. 398, 411 (1951).

[27] "'Interpretative' rules—as merely interpretation of statutory provisions—are subject to plenary review, whereas 'substantive rules' involve a maximum of administrative discretion." Senate Committee Print, Sen. Doc. No. 248, 79th Cong. 2d Sess. p. 18 (1946).

buying groups in the automotive parts industry, fictitious pricing and deceptive guaranty practices in the watch industry, deceptive labeling of reprocessed motor oils, misrepresentations of hair restoring remedies, to list a few. If such practices were approached on a quasi-legislative basis, these could be likely advantages:

1. The problem of equitable treatment among competitors would be simplified. At the conclusion of the whole rule-making proceeding, in which all would have had an opportunity to participate, all members of the industry would be equally informed of the Commission's ruling as to the practice in question.

2. The existence of an authoritative, prohibitory statement by the Commission carrying with it formal, enforceable sanctions with respect to a given practice would have an extremely strong deterrent effect upon the members of the industry.

3. Subsequent quasi-judicial proceedings against recalcitrant members of the industry would be immensely simplified because these proceedings would involve only the factual issue of whether the rule had been violated. The effect of the Act producing the violation would not be an issue in subsequent proceedings.

Such procedures could endow the Commission with a new, far-ranging flexibility. For example, the present case-by-case approach is cumbersome and poorly adapted in many instances to keeping pace with the commercial innovations of a dynamic economy. The regular emergence of new types of distribution outlets, new methods of distribution, new selling devices, and ever-deepening competitive pressures, finds the Commission unable to keep pace by using case-by-case method solely. It may well be argued that the administration of those statutes confided to the Commission's enforcement might be made far more effective in many instances by the use of rule-making procedures than through disjointed, long-drawn out, case-by-case adjudicative process.

Rule-making procedures would be limited to a narrow range of practices which the Commission had reason to believe were in violation of law. In contrast to Trade Practice Conference Rules, the results—after full hearing, and subject to appropriate judicial review—would be conclusive, so far as the issue of lawfulness was concerned. Subsequent adjudicative proceedings could then be instituted against particular respondents charged with violation of the rule, and the rule would carry with it the same sanctions as would the statute itself. Thus, these rule-making proceedings

would not be aimed at a generalized restatement of the law as applied to a particular industry or at solving every industry problem in one package, but, rather, would be focused upon critical competitive problems in a particular industry as they arose. In this respect, the results would be more like Internal Revenue Service tax rulings than like our present Trade Practice Rules or Industry Guides.

The use of substantive rule-making proceedings could mean a substantial re-alignment in the Commission's activities. It should be emphasized once again that these recommendations suggest no abatement in the Commission's fundamental adjudicative work; but they do contemplate a strong, new emphasis upon the solution of industry-wide problem areas through rule-making procedures as a supplement to the Commission's present enforcement responsibilities. In fact, it is quite possible that case-by-case application of a prior fixed rule would involve a far narrower, less complicated range of issues than under the present procedures with a consequential increase in the number and effectiveness of the Commission's adjudicative efforts.

This would require more than a re-alignment. It would require also a competent legal and economic staff at the Commission and the sympathetic cooperation of American businessmen as well. They must appreciate the basic fact that effective antitrust enforcement is the most pro-business public policy ever developed by the genius of American democracy. Its sole objective is to insure the preservation of a competitive enterprise system. Too often businessmen miss this point. It is no accident of economic and political history that nations with truly competitive economies have never embraced totalitarian creeds, either of the fascistic or communistic variety.

A vigorous and informed antitrust enforcement program is just as important to businessmen as it is to labor, farmers, and consumers. After all, we are all in the same economic boat, and it is driven by the enterprise system. It then inevitably follows that public officials must have the economic facts necessary to make informed judgments as to how competitive processes may be preserved.

As has been mentioned earlier, the case approach to antitrust problems is not adequate for many of our problems. The great danger of relying solely on this approach is that it strikes only at individual firms and often fails to develop the economic facts

necessary to develop adequate remedy. It cannot be emphasized too strongly that we must make reliable economic understanding the cornerstone of any legal edifice constructed to ensure the maintenance of a competitive economy.

The case approach is especially effective when two assumptions are fulfilled: (1) a particular firm (or small group of firms) is violating a law, and (2) the economic and legal remedy is relatively simple.

The most meritorious derivative of the suggested approach to competitive problems is that it directs attention to an entire industry rather than focusing attention solely on particular firms, and it involves an analysis of all relevant aspects of a problem rather than dealing only with symptoms. Moreover, if businessmen cooperate willingly in such undertaking, they may become partners rather than antagonists in the development of sound antitrust policies. This should avoid many of the pitfalls of becoming enmeshed in the interminable legal processes inherent in the case approach. The adversary approach to antitrust problems too often emphasizes conflicts and differences, when what we should strive for is a harmonizing of interests.

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